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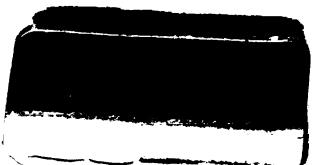
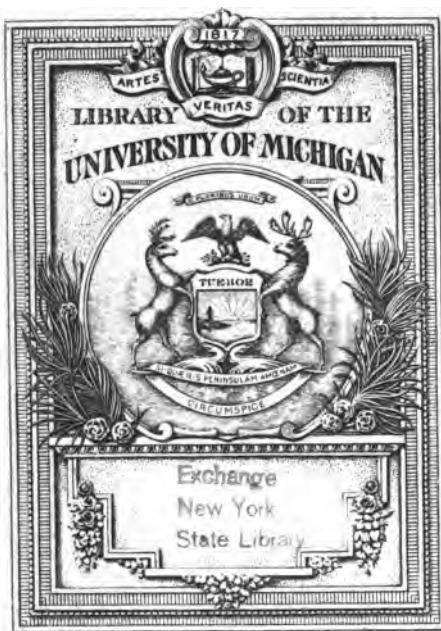
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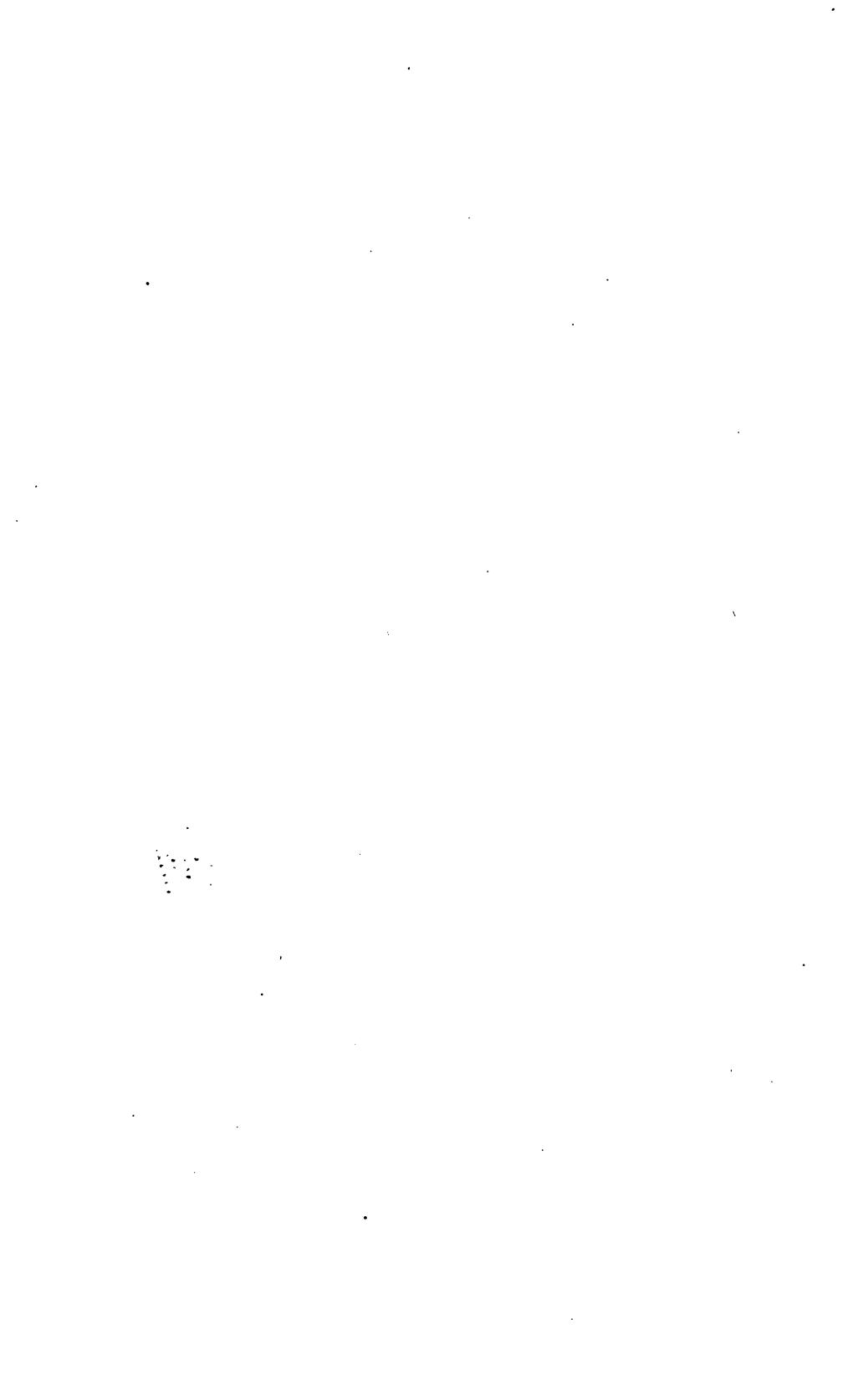
ONE HUNDRED AND FORTY-SECOND SESSION

1919

VOL. XI—NO. 14, PART 4



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1919



REPORTS OF DECISIONS

OF THE

PUBLIC SERVICE COMMISSION

SECOND DISTRICT

OF THE STATE OF NEW YORK

FROM JANUARY 1, 1918, TO DECEMBER 31, 1918

Volume VII

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1919**

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¹ Resigned, effective February 1, 1918.

² Died February 4, 1918.

³ Appointed February 20, 1918, vice Carr, resigned.

⁴ Appointed February 25, 1918, vice Van Santvoord, term expired; designated Chairman by Governor February 25, 1918.

⁵ Appointed April 16, 1918, vice Emmet, deceased.



The Public Service Commission, Second District of the State of New York, was appointed pursuant to the provisions of chapter 429 of the laws of that State for the year 1907, and took office July 1, 1907. It is the practice of the Commission to file written opinions in such contested matters coming before it as seem to demand careful statement of the grounds for the decision. It is also the practice in *ex parte* applications to file written opinions, where the facts are complicated or an interpretation of the laws conferring jurisdiction upon the Commission is required. These opinions are first printed in pamphlet form, and will be published in bound volumes from time to time.



TABLE OF CASES

	PAGE
Addison Gas and Power Co., matter of [rates].....	98
Albany Southern Railroad Co., matter of [fares].....	321
Alden-Batavia Natural Gas Co., Mayor of Batavia <i>v.</i>	166
Auburn and Syracuse Electric Railroad Co., matter of [fares].....	371
Auburn, City, etc., <i>v.</i> Empire Gas and Electric Co.....	150
 Babylon Railroad Co. et al., matter of [rates].....	278
Batavia, Mayor, <i>v.</i> Alden-Batavia Natural Gas Co.....	166
Binghamton Railway Co., residents Binghamton, etc., <i>v.</i>	177
Binghamton, residents, etc., <i>v.</i> Binghamton Ry. Co.....	177
Buffalo Foundry and Machine Co. <i>v.</i> New York Central and Hudson River R. R. Co.....	123
Buschini, Flori, matter of [certificate].....	299
 Central Hudson Gas and Electric Co., matter of [service].....	336
Chatham Electric Light, Heat and Power Co., States Metals Co., Inc., <i>v.</i>	238
Clyde, Village, etc., <i>v.</i> Empire Gas and Electric Co.....	150
Cohoes Co. et al., matter of [merger, etc.].....	255
Cohoes Gas Light Co. et al., matter of [merger, etc.].....	255
Cohoes Power and Light Corp. et al., matter of [merger, etc.].....	255
Commuters <i>v.</i> Rochester and Syracuse R. R. Co., Inc.....	231
Corning, Mayor, etc., <i>v.</i> Crystal City Gas Co.....	180
Crystal City Gas Co., George W. Lane, etc., <i>v.</i>	180
Curtiss, M. D., <i>v.</i> Elmira Water, Light and Railroad Co.....	120
Customers, etc., <i>v.</i> Newfane Electric Co.....	269
 Delaware, Lackawanna and Western Railroad Co. et al., matter of [Frontier El. Ry. Co.].....	106
Dosch, Theodore J., et al. <i>v.</i> New York Central R. R. Co.....	354
Drake, Henry C., etc., <i>v.</i> New York Central R. R. Co.....	14
Dunkirk Street Railway, matter of [abandonment route, etc.]....	352
 Elmira Water, Light and Railroad Co., Horseheads Transportation Protective Association et al. <i>v.</i>	247
Elmira Water, Light and Railroad Co., M. D. Curtiss <i>v.</i>	120

TABLE OF CASES

	PAGE
Empire Gas and Electric Co., Mark I. Koon et al. v.....	150
Empire Gas and Electric Co., matter of [rates].....	150
Erie Railroad Co., Town of Harmony v.....	188
Falconer, Village, v. Pennsylvania Gas Co.....	242
Fishkill Electric Railway Co., matter of [fares].....	194
Fonda, Johnstown and Gloversville Railroad Co., matter of [fares]..	330
Franklin, H. H., Manufacturing Co. v. New York Tel. Co.....	199
Fredonia, Village, etc., v. New York Central R. R. Co.....	14
Frontier Electric Railway Co. [sale of stock].....	106
Gaiser, Edson U., matter of [certificate].....	147
Galgano, Frank, et al. v. Westchester Lighting Co.....	173
Geneva, City, etc., v. Empire Gas and Electric Co.....	150
Geneva, Seneca Falls and Auburn Railroad Co., matter of [fares]..	160
Griffing, Edward Stetson, etc., v. Westchester Lighting Co.....	173
Groton Electric Power Corp., matter of [construction, etc.].....	11
Gulvin, Reuben H., etc., v. Empire Gas and Electric Co.....	150
Harmony, Town, v. Erie R. R. Co.....	188
Hayner, Charles H., et al. v. New York Central R. R. Co.....	354
Himrod Station, Shippers, v. Pennsylvania R. R. Co.....	339
Horseheads Transportation Protective Association et al. v. Elmira Water, Light and R. R. Co.....	247
Hudson Valley Railway Co., matter of [fares].....	287
Ithaca Traction Corp., matter of [fares].....	283
Johnson City, residents, etc., v. Binghamton Ry. Co.....	177
Judge, W. J., Samuel R. Wickett et al. v.....	275
Judson, Harriet De Lano, et al. v. New York Central R. R. Co....	354
Koon, Mark I., etc., v. Empire Gas and Electric Co.....	150
Lambert, John, jr., et al. v. Westchester Lighting Co.....	173
Lane, George W., etc., v. Crystal City Gas Co.....	180
Less than carload freight, matter of [marking].....	16
Lockport Light, Heat and Power Co., matter of [rates].....	27
Long Island Lighting Co. et al., matter of [rates].....	278
Lord, Charles, et al. v. Westchester Lighting Co.....	173

TABLE OF CASES

9

	PAGE
McCain, C. C., matter of [marking freight].....	16
McIntyre, John H., etc., <i>v.</i> United Traction Co.....	207
Maloney, F. R., <i>v.</i> Norwood and St. Lawrence R. R. Co.....	359
Marking less than carload freight, matter of.....	16
Middleport, Village, et al. <i>v.</i> New York Central R. R. Co.....	354
Municipal Gas Co., Albany, matter of [rates].....	128
 Newark, Village, etc., <i>v.</i> Empire Gas and Electric Co.....	150
Newfane Electric Co., Customers, etc., <i>v.</i>	269
New Rochelle, Mayor, etc., <i>v.</i> Westchester Lighting Co.....	173
New York Central and Hudson River Railroad Co., Buffalo Foundry and Machine Co. <i>v.</i>	123
New York Central Railroad Co., Henry C. Drake, etc., <i>v.</i>	14
New York Central Railroad Co., matter of [Pulvers station].....	104
New York Central Railroad Co., Village of Middleport et al. <i>v.</i>	354
New York State Railways, matter of [fares].....	302
New York Telephone Co., H. J. Franklin Manufacturing Co. <i>v.</i>	199
Norwood and St. Lawrence Railroad Co., F. R. Maloney <i>v.</i>	369
 Ogdensburg Street Railway Co., matter of [fares].....	135
 Pavilion Natural Gas Co., matter of [service].....	183
Pennsylvania Gas Co., Village of Falconer <i>v.</i>	242
Pennsylvania Railroad Co. et al., matter of [Frontier El. Ry. Co.]..	106
Pennsylvania Railroad Co., Shippers of Himrod Station <i>v.</i>	339
Phelps, Village, etc., <i>v.</i> Empire Gas and Electric Co.....	150
Poughkeepsie and Wappingers Falls Railway Co., matter of [fares].	138
 Raquette Lake Railway Co., matter of [discontinuance operation, etc]	345
Rensselaer, City, etc., <i>v.</i> United Traction Co.....	207
Rochester and Syracuse Railroad Co., Inc., Commuters <i>v.</i>	231
 Seneca Falls, Village, etc., <i>v.</i> Empire Gas and Electric Co.....	150
Smith, Albert E., et al. <i>v.</i> New York Central R. R. Co.....	354
Smith, Frank M., et al. <i>v.</i> New York Central R. R. Co.....	354
Southern New York Power and Railway Corp., matter of [fares]..	364
States Metals Co., Inc., <i>v.</i> Chatham Electric Light, Heat and Power Co.	238
Syracuse and Suburban Rail Road Co., matter of [fares].....	262

TABLE OF CASES

	PAGE
Telesco, Dominick, et al. v. Westchester Lighting Co.....	173
United Traction Co., John H. McIntyre, etc., v.....	207
United Traction Co., matter of [fares].....	207
Waterloo, Village, etc., v. Empire Gas and Electric Co.....	150
Waverly, Sayre and Athens Traction Co., matter of [fares].....	19
Westchester Lighting Co., Frank Galgano et al. v.....	173
Western New York and Pennsylvania Traction Co., matter of [fares]	224
Wickett, Samuel R., et al. v. W. J. Judge.....	275

In the Matter of the Petition of GROTON ELECTRIC POWER CORPORATION under section 68, Public Service Commissions Law, for permission to construct an electric plant in the towns of Dryden and Groton, and in the incorporated villages of Freeville and Dryden, Tompkins county; and for approval of franchises therefor from municipal authorities. [Case No. 6284.]

An electric company applied for permission to construct and for approval of franchises in certain villages and towns where there is a decided need for electric service. The company was not yet fully organized as a corporation. It had filed its certificates but had obtained no authorization for capital stock from this Commission. In the circumstances it was held that the application should be granted but that no construction should be undertaken until proper capital authorization from the Commission should be secured.

Decided January 3, 1918.

Appearances:

E. H. Bostwick for the petitioner.

IRVINE, Commissioner:

This application, under section 68 of the Public Service Commissions Law, presents a case perfectly clear on the question of public convenience and necessity and the general practicability of the enterprise, but the corporate situation of the applicant is so peculiar that some explanation of the order granting the petition should be placed on record.

The applicant, the Groton Electric Power Corporation, seeks permission to construct an electric plant in the towns of Dryden and Groton, and in the incorporated villages of Freeville and Dryden, all in Tompkins county, and for approval of franchises therefor granted by the town and village boards of the four municipalities. The petitioner has duly filed and recorded its certificate of incorporation in the office of the

12 PUBLIC SERVICE COMMISSION, SECOND DISTRICT

P.S.C. 2d D.

Secretary of State and in the office of the Clerk of Tompkins County. It is nevertheless only an inchoate corporation, for while it appears that its proposed capital stock of \$20,000 has been entirely subscribed, it has not received from this Commission, nor has it applied for, any authorization to issue such stock or any other form of capital securities. It did apply to the Commission for permission to construct and for the approval of a franchise granted by the Village of Groton. It appeared in that case that the village board of the Village of Groton had undertaken to make a lease to the petitioner of a municipal lighting plant without authority by vote of the people. The application was denied solely because the Commission deemed such lease unauthorized by law under the circumstances. (Opinion No. 322.) The petitioner, however, had been placed in possession by the village and is apparently still operating therein as an agent of the village. It has no power plant of its own but is operating the Groton plant, and it was testified at the hearing that it could obtain any amount of power required for its new enterprise through the Ovid Electric Company, whose application under section 68 for the town of Lansing has been approved by the Commission. There are three possible sources of power to be reached through the Ovid company which is owned and controlled by the same interests as the Groton company. Regardless of the situation in the village of Groton, it is therefore practicable for the Groton company to fulfill its duties under the franchises involved in the present case.

The town of Dryden adjoins the town of Groton on the south, and the town of Groton adjoins the town of Lansing on the east. The village of Groton is almost in the center of the town. Within the town of Dryden are the incorporated villages of Freeville and Dryden. Freeville has four to five hundred inhabitants; Dryden from seven to nine hundred. Between these two communities and in the town is the George Junior Republic, with from twenty to twenty-five houses and the Republic Inn, a hotel of considerable size,

Vol. VII.

which desires current for lighting and power. There is no electric service in either town or either village. There is a municipally owned acetylene gas plant in the village of Dryden but it is in bad condition: the village desires to abandon it and it has approved the petitioner's application. The chief object is to serve the two villages and the Republic community, but there are provisions in the town franchises for furnishing electric energy in the regions adjoining the proposed transmission line. These provisions are perhaps not of great importance because the Commission, in the exercise of its powers, could compel reasonable and proper service in the exercise of the town franchises. The needs of the communities are such that the exercise of the franchises should be approved, but commencement of construction should not be authorized until the petitioner puts itself in financial condition to construct and to operate under the franchises by obtaining suitable capital authorization from the Commission and by becoming a real corporation instead of merely the potential corporation which it now is.

Chairman Van Santvoord and Commissioner Carr concur; Commissioners Emmet and Barhite not present.

14 PUBLIC SERVICE COMMISSION, SECOND DISTRICT
P.S.C. 2d D.

In the Matter of the Complaint of HENRY C. DRAKE, as President of the Village of Fredonia, *against* THE NEW YORK CENTRAL RAILROAD COMPANY, asking that gates be provided and maintained at a crossing at grade of the Valley division of said company's railroad and East Main street, in said village. [Case No. 6241.]

In these days of fast and careless driving, neither gates nor any other device guarantees safety at a grade crossing.

Decided January 10, 1918.

Appearances:

W. J. Westwood, Esq., Fredonia, N. Y., attorney for complainant, Henry C. Drake, Esq., as President of the Village of Fredonia, who also appeared in person.

Locke, Babcock, Spratt and Hollister, Buffalo, N. Y., attorneys for The New York Central Railroad Company.

Kenefick, Cooke, Mitchell and Bass, Buffalo, N. Y., attorneys for Receiver Buffalo and Lake Erie Traction Company.

BARHITE, Commissioner:

This is an application by the President of the Village of Fredonia, New York, to compel The New York Central Railroad Company to place gates at the single track crossing of its Valley branch, Erie division, over East Main street in said village. This street is a part of the Buffalo and Erie highway, and is the main road for vehicles between Buffalo, New York, and the west. The crossing is now protected by a crossing-sign, as it appears somewhat improperly placed, and by a standard crossing-bell electrically operated by trains as they approach the crossing. The station and freight offices are situated 270 feet south of the crossing. At present there are eight regular trains per day, four passenger and four freight, operated over the road. North of the highway are two manufacturing plants on opposite sides of the railroad which obstruct the view of those who may approach the

Vol. VII.

crossing, and are the occasion of some switching operations although no switch track passes over the street. The crossing-bell has been in position a little over two years. There is some dispute as to whether it has always been in order, but there is no reason why it should not be kept in good working condition with proper inspection. The evidence is that it is examined every morning by a railroad employee. This bell is not a sufficient protection, especially to persons who may be riding in a close vehicle. Formerly the crossing was protected by a flagman who was employed at the station but who went to the crossing when necessary. This arrangement was not entirely satisfactory, as it is claimed the flagman was not always efficient and his signals at times were misunderstood. It may be said, however, that in these times of fast and careless driving neither gates nor any other device guarantees safety at a grade crossing. Attention may be called to the fact that if gates are placed at this crossing the village authorities can not limit the speed of trains at this point to less than forty miles an hour. Without the gates the speed may be controlled to any reasonable limit. The petitioner proposes that the gates, if built, shall be operated from the station, 270 feet away. It would seem that an active flagman on the crossing, with an unobstructed view of the street in both directions, would be more efficient than a man 270 feet away from the street, closing gates while he is unable to see any vehicle which might be approaching or know its rate of speed. To close a gate immediately in front of a rapidly moving automobile or one managed by a careless driver would be a source of danger rather than of safety. Under present financial conditions, and the conditions of operation which must necessarily govern the movement of the limited number of trains over this crossing, it would not seem advisable to direct the railroad company to erect gates at this point.

Chairman Van Santvoord and Commissioners Irving and Carr concur; Commissioner Emmet not present,

In the Matter of Marking Less Than Carload Shipments of Freight. Petition of C. C. McCAIN, Joint Agent of the Carriers, for Modification of Orders. [Case No. 397.]

1. The orders of the Commission of August 19 and September 17, 1908, relating to the marking of less than carload freight, are modified because of present transportation conditions by eliminating therefrom the exceptions to the rule requiring each package, bundle, or piece to be separately marked.

2. It appearing that some exceptions to the general rule will in all probability be made evident by experience, the carriers are left at liberty to make exceptions and modifications to the rule of their own initiative, and the shippers, in the event of refusal by the carriers to make such modifications, are permitted to apply to the Commission therefor.

Decided January 15, 1918.

IRVINE, *Commissioner*:

In 1908 the common carriers within the State adopted what was known as Rule 3, and is now Rule 3 of the Official Classification, requiring each package, bundle, or piece of less than carload freight to be plainly marked by brush, stencil, pasted label, or securely fastened tag, showing the name of consignee and the name of the station, town, or city, and the State to which destined. This rule contained other provisions not here material. Complaint having been made against certain carriers, the Commission, August 19, 1908, made an order requiring certain exceptions to this rule, as follows:

(a) When articles are not boxed, barreled, crated, or sacked, and are shipped loose in pieces, or when pieces are wired or otherwise fastened together in lots or bundles, and the shipment consists of not more than ten pieces, lots, or bundles, at least two pieces, lots, or bundles in each shipment shall be marked in accordance with this rule; and when the shipment consists of more than ten pieces, lots, or bundles, one for every ten or additional part thereof shall be so marked, but not more

than ten such markings shall be required for any shipment from one consignor to one consignee and destination. Each marking under this exception must show the total number of pieces, lots, or bundles in the entire consignment.

*^(b) Flour, feed, cement, lime, or plaster, in sacks, bearing upon the package or shipping tag the name and address of shipper, printed, stamped, stenciled, or plainly written, when the shipment consists of not more than ten sacks, at least two sacks in each shipment shall be marked in accordance with this rule; and when the shipment consists of more than ten sacks, one for every ten or additional part thereof shall be so marked, but not more than ten such markings shall be required for any shipment from one consignor to one consignee and destination. Each marking under this exception must show the total number of sacks in the entire consignment.

^(c) Grapes, when shipped in lots of 10,000 pounds or more by one consignor to one consignee and destination, will be accepted without marking of packages.

^(d) Articles which are not classified or rated in carloads and are subject to less than carload rates for shipment in any quantity, and which are shipped loose in pieces or in packages from one consignor to one consignee and destination, and are loaded by shippers in cars to 30,000 pounds or the cubic capacity of the car, will be accepted without marking.

By order made September 17, 1908, this requirement was extended to all other carriers within the State. Certain of the carriers affected have applied to the Commission for a rescission of these exceptions, asserting that the present congestion of freight, causing efforts to require in all cases full loading of cars and other practices in the interest of prompt and economical transportation and delivery of goods, demand a separate marking of each piece of less than carload freight. It is contended that the practice of marking only certain pieces in a less than carload shipment of a number of pieces of the same kind results in a confusion of goods and serious loss to the carriers. There is evidence by several shippers that they have experienced no serious losses or damage through the operation of the rule. However this may be, the Commission is of the opinion that under existing conditions and until the return of normal conditions, the trans-

18 PUBLIC SERVICE COMMISSION, SECOND DISTRICT
P.S.C. 2d D.

portation of less than carload freight will be facilitated and its prompt delivery more nearly secured by rescinding the exceptions designated as *a*, *b*, *c*, and *d* in the orders of August 19, 1908, and September 17, 1908.

It is realized that in the multiplicity of commodities falling within Rule 3, and especially those falling within exception *d*, experience may show that the individual marking of each piece is unnecessary, uneconomical, or even impracticable. It is believed that much may be accomplished by boxing, crating, or bundling some commodities and marking each box, crate, or bundle. Nevertheless, experience will probably show that some exceptions to the general rule should be made.

It was admitted at the hearing that the practice as to shipping grapes is such as to render the broad rule impracticable. Apparently some other fruits are in the same category. It is expected that the carriers will promptly propose a reasonable exception to the rule in respect of these commodities. They should also be at liberty to make any other exceptions and modifications of the rule which experience shall prove to be wise and economical. The shippers also should be at liberty to apply to the carriers for exceptions and modifications, and to this Commission should the carriers refuse to comply with their requests.

Commissioners Carr and Barbite concur; Chairman Van Santvoord and Commissioner Emmet not present.

In the Matter of the Petition of WAVERLY, SAYRE & ATHENS TRACTION COMPANY under subdivision 1, section 49, Public Service Commissions Law, for permission to increase passenger fares. [Case No. 6099.]

Upon an examination of the operating revenues and operating expenses of the petitioner as set forth in the Opinion it was held that it is entitled to increase its rate of fare within the village of Waverly from five cents to six cents.

Decided January 31, 1918.

Appearances:

Thomas O'Connor, Waterford, N. Y., for the applicant.

IRVINE, Commissioner:

This is a petition under section 49 of the Public Service Commissions Law asking that the Commission determine that the rate to be received by the petitioner within the limits of cities and incorporated villages shall be six cents per passenger. This is one of a large group of cases of the same general character. The power of the Commission in the premises and its duties under the law were discussed in the matter of the petition of the Huntington Railroad Company, Opinion No. 324. The applicant, Waverly, Sayre & Athens Traction Company, has no tracks and conducts no operations in the State of New York except in the village of Waverly, so fares within that village alone are involved in this case. The company's lines are a little less than eleven miles in extent. Three lines are operated. One operates wholly within the village of Waverly and forms what is commonly known as the "Loop". Another starts at the business center of Waverly, on Broad street, and is operated eastward along that street on the same tracks used by the loop about eighteen hundred feet. It then turns southerly, almost immediately crosses the state line, and extends through Sayre, Pennsylvania, and into and through Athens. The third line starts at the same point in Waverly, goes westerly along Broad street on the

same track occupied by the local line about twelve hundred feet, then turns southerly and passes through South Waverly and Sayre to a junction with the second line about at the business center of that community. The determination of this case is complicated by this interstate operation. The present rates are five cents on the loop, five cents from Waverly to South Waverly and to Sayre, and ten cents from Waverly to Athens. Transfers are given to and from the Loop line and between that line and the other two. A hearing was held in Albany December 31, 1917, at which no one appeared in opposition.

In support of its contention that its New York State line, that is to say, the line that has been styled the "Loop," does not yield a sufficient return, the applicant offered evidence to show that its receipts within the State in the five months July to November, 1917, inclusive, amounted to \$2648.79. This includes \$983.54 received as rent from the Elmira, Corning and Waverly Railroad, and \$7.20 for freight. The company purchases power from the Sayre Electric Company, and on a car-mileage basis the power during the same time cost the applicant \$952.21. The platform expenses were \$1211.76. This leaves a surplus of revenue over these two items of operating expense of \$484.82. In addition, it was proved that the price for power as fixed by contract between the Sayre company and the applicant slides with the price of coal, and that under prices so fixed for the year 1918 the power expense will be very materially increased. It has not been deemed proper to base a decision on this rather meager information. Therefore the records on file with the Commission for the year 1916 have been examined, as reported by the company. The total number of five cent fares collected on the Loop line was 145,414. The total number of transfers collected on this route was 64,679. A very large part of the company's business consists in carrying passengers between their homes in Waverly and the Lehigh Valley shops in Sayre, so that while there is a transfer point between

Pt. VII.

the two interstate lines in Sayre it may be assumed without detriment to the public and without serious injury to the applicant that the number of transfers so stated represents approximately the number of interstate passengers. This gives us as the number of intrastate passengers 80,735, or intrastate revenue at five cents \$4036.75. Taking the company's evidence as to its passenger revenue for five months of 1917 (by deducting from the total revenue rentals and freight revenue), we find that this is equivalent to a yearly intrastate revenue of \$3979.32. It is evident, therefore, that the previous assumptions were very close to the truth. The Loop line should properly be credited with its proportion of interstate revenues as disclosed by the transfers. In making this calculation it has been assumed that the average ride of interstate passengers is from Clinton avenue and Center street in Waverly, by Clinton avenue, Pine and Broad streets, into Pennsylvania, and as far as North Elmer avenue and Cayuga street in Sayre. The Sayre point is assumed to be about the central point for employees of the Lehigh Valley. The point taken in Waverly is about half way around the loop and probably represents a greater distance than the average traveled in Waverly.

The Interstate Revenues: In apportioning the interstate revenues as between the Loop line and the interstate lines it has seemed fair to calculate it by proportionate distances. The following result is reached:

Interstate revenue, 64,679 transfers at 5 cents, \$3233.95.

Assumed average interstate ride: from Clinton avenue and Center street, Waverly, via Clinton, Pine, and Broad to North Elmer avenue and Cayuga street, Sayre, by map, 8900 feet.

New York proportion of assumed average interstate ride, by map, 6000 feet.

New York proportion of interstate revenue ($6000/8900 \times \$3233.95$)
\$2179.68.

Total annual passenger revenue to be credited to Clinton Avenue line
(\$4036.75 intrastate, \$2179.68 New York proportion of interstate)
on basis of 1916, \$6216.43.

22 PUBLIC SERVICE COMMISSION, SECOND DISTRICT

P.S.C. 2d D.

It will be remembered that the applicant proved only two items of operating expenses. In endeavoring to reach a fair estimate of the entire actual operating expenses, it has been assumed that the proportion of platform and power expenses to maintenance, general, and other expenses was the same for the loop as for the whole system. We reach these results:

Expenses Assignable to the Loop:

Annual cost of operating line on basis of testimony as to five months of 1917, 12/5 of \$952.21.....	\$2,285.28
Annual platform expense, same basis, 12/5 of \$1211.76...	2,908.20
	<hr/>

\$5,193.48

Platform and power expenses entire line, as reported for 1916, were	\$40,373.65
Total operating expenses 1916 were.....	\$72,834.57
Assuming that proportion of platform and power expenses to maintenance, general, and other expenses was the same for Clinton Avenue line (the Loop) as for the whole system, total expenses to be charged against that line would be (72835/40374 x \$5193)	\$9,373.37

By this process of estimating the total intrastate revenues and expenses it appears that the Loop line in 1916 failed by a very considerable amount to meet its operating expenses —

Expenses.	\$9,373.37
Passenger revenues	6,216.43
	<hr/>

Deficit. \$3,156.94

It does not necessarily follow from this calculation that the company is entitled to increase its fare beyond the five cents fixed by section 181 of the Railroad Law. In order to reach any conclusion we must examine the entire operations of the corporation and for a series of years. The following shows the Income Account for the years stated:

WAVERLY, SAYRE & ATHENS TRACTION CO.

28

Vol. VII.

INCOME ACCOUNT for each fiscal year ended June 30, 1910, to June 30, 1917, inclusive.

Item	1910	1911	1912	1913	1914	1915	1916	1917
	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars
Operating revenues, railroad.....	77,215	84,160	90,640	95,467	98,193	93,760	98,655	101,007
Operating expenses, railroad.....	59,214	61,422	68,197	67,953	73,140	73,879	70,642	76,962
Net operating revenues.....	18,000	22,738	22,442	27,513	25,052	19,580	29,016	24,045
Taxes accrued.....	2,081	2,450	2,621	2,638	2,822	3,210	3,876	3,000
Operating income, railroad.....	15,921	20,288	19,821	24,830	22,230	16,670	25,140	20,445
Total operating income.....	15,921	20,288	19,821	24,830	22,230	16,670	25,140	20,445
Non-operating income.....	.....	.....	.....	.....	.....	.....	.....	.....
Non-operating revenue deductions.....	.....	.....	.....	.....	.....	.....	.....	.....
Gross income.....	15,921	20,288	19,821	24,830	22,230	16,670	25,140	20,445
Gross income deductions:								
Interest accrued on funded debt.....	12,300	12,300	12,300	13,300	15,250	15,250	18,710	18,710
Interest accrued.....	2,902	2,669	2,986	4,446	1,440	1,829	1,273	1,127
Amortization charged to income.....	100	100	100	100	180	270	300	150
Total deductions from gross income.....	15,202	14,969	15,386	17,346	14,920	17,349	16,823	19,987
Net corporate income.....	719	5,319	4,435	7,484	7,310	679	8,317	458
Surplus or deficit previous year.....	31,886	32,555	33,657	35,115	42,599	49,909	49,230	57,547
Miscellaneous debits.....	.....	4,218	2,977	.....	.....	.....	.....	.....
Surplus or deficit June 30th.....	32,555	33,657	36,115	42,599	49,909	49,230	57,547	58,005

Figures in italics denote deduction or deficit.

24 PUBLIC SERVICE COMMISSION, SECOND DISTRICT

P.S.C. 2d D.

This indicates a surplus in the operation of each year except 1915. However, we find an unusual state of affairs in respect to interest on funded debt. The president of the company owns all the stock except six shares, apparently held as qualifying shares. The company has outstanding bonds to the par value of \$460,000. A considerable amount of these bonds is owned by the president of the company, who has each year surrendered to the company and canceled the interest coupons. No dividends have been paid during the period covered by the above tables. Correcting the gross income deductions by adding thereto the amount of coupons each year so surrendered we reach the following result:

Corrected Gross Income Deductions.

Item	1910 Dollars 20,288	1911 Dollars 19,821	1912 Dollars 24,330	1913 Dollars 22,230	1914 Dollars 16,870	1915 Dollars 25,140	1916 Dollars 20,445
Gross income.....	15,921						
Interest accrued on funded debt, paid.....	12,300	12,300	12,800	13,300	15,250	15,250	18,710
Interest accrued on funded debt, unpaid.....	8,700	8,200	8,700	10,600	9,150	9,250	5,700
Other interest accrued.....	2,902	2,869	2,986	4,464	1,839	1,273	1,127
Amortization charged to income.....		100	100	100	270	300	150
Total deductions from gross income.....	21,902	23,169	24,536	25,520	26,490	26,073	25,777
Net corporate income.....	5,981	9,881	4,766	1,254	\$,290	2,829	5,332
Surplus or deficit previous year.....	31,886	25,855	18,756	11,014	9,780	6,490	3,330
Miscellaneous debits.....		4,218	2,977	.....	.....	.....	4,272
Surplus or deficit.....	25,885	18,756	11,014	9,780	6,490	3,339	4,272
							9,604

Figures in italics denote deduction or deficit.

26 PUBLIC SERVICE COMMISSION, SECOND DISTRICT
P.S.C. 2d D.

No valuation of the road has been made nor does it seem necessary. As stated, the company owns almost eleven miles of track with the accompanying overhead structures. There are six steel bridges of an aggregate length of 664 feet. A considerable portion, 3.54 miles, is on paved streets. The company owns and uses twenty-three cars. It requires no very great familiarity with the cost of such systems to justify the inference that the property used in the public service is worth the amount of the outstanding bonds. The owners of stock and bonds are not required to go without dividends or interest in these circumstances.

While the evidence relating to the New York State property and operations taken in connection with the general situation of the road exhibits a state of affairs demanding that the relief asked for be granted, the company is advised that, while the New York State operation is probably the least remunerative, it is closely interlinked with the interstate operation, and that the company should consider carefully the wisdom and necessity of asking that its other patrons share the burden. In fact, some adjustment must be made, because passengers riding solely in the State of New York can not be charged six cents while passengers riding over the same line and transferring into Pennsylvania pay only five cents.

Chairman Van Santvoord and Commissioners Carr and Barhite concur; Commissioner Emmet not present.

In the Matter of the Petition of the LOCKPORT LIGHT, HEAT AND POWER COMPANY for permission to revise its rates for electric lighting and power service. [Case No. 4335.]

1. Regulation of public service corporations has developed the fact that competition and regulation do not go hand in hand but are directly antagonistic to each other, and it has been demonstrated repeatedly that two electric light and power companies whose entire business is confined to a small city can not successfully compete and earn a fair return upon the capital invested unless they charge excessive rates for the service performed.

2. When a city grants franchises to two different corporations enabling them to compete for the electric light and power business in the community, and the companies are afterward merged or consolidated, the city can not successfully urge that the owners of the property which was installed for the benefit of the people of the city shall not be allowed to earn a fair return upon the value of all the property employed in the public service.

The fact that there may be a duplication of property is due to the situation which was created by the city when it granted two franchises to two separate corporations, and the owners of the property must be allowed a reasonable opportunity to work out of the difficulty.

3. An electric light and power company which acquires the existing plants and property of two other corporations engaged in a similar business for a specific amount of stock and bonds is not entitled to any allowance for a deficiency of return prior to the time when it acquired said properties.

4. The stockholders of a corporation which invests its money in property employed in the service of the public, and who assume all the risks incidental thereto and endeavor to give the people the kind of service to which they are entitled, should receive a return of at least 8 per cent upon their investment. It is also desirable that the corporation should earn something in addition for surplus and contingencies as this tends to improve the financial structure of the organization and keep its credit, and it also puts the company in a position where it can and properly should make extensions promptly as and when they are required to give additional service to the public.

5. A service charge for electricity is justified inasmuch as it tends to make each user of electricity pay a certain portion of the fixed charges which are involved in giving him service. This applies to all classes of consumers of electricity regardless of the quantities used.

It is a well accepted fact that where electricity is sold in small quantities for residence lighting purposes on a flat kilowatt-hour basis, these customers do not ordinarily pay their fair share of the overhead charges which are incurred by the corporation in furnishing the service.

In the present case a service charge of seventy-five cents per month for residence lighting customers is fair and reasonable.

While there are certain elements entering into the cost of giving the service which are more or less uniform in every community, yet the amount which may properly be fixed as a service charge in any community depends upon the facts which pertain in each particular case.

Decided January 31, 1918.

Appearances:

Beekman, Menken & Griscom (by Morton G. Bogue), and *Storrs & Storrs* (by William W. Storrs) for Lockport Light, Heat and Power Company.

W. A. Gold, Corporation Counsel, and *Chas. Hickey* for the City of Lockport.

Hickey, Thompson & Gold for Electric Consumers Protective Association, the Board of Commerce, and the Manufacturers Association.

Care, Commissioner:

On May 27, 1914, the Lockport Light, Heat and Power Company, which we shall refer to hereafter as the Lockport Company, filed its petition with this Commission requesting permission to establish new and revised rates for electric energy in the city of Lockport, N. Y., for the reason that the then existing rates with respect to the method of charging for such energy sold by it were obsolete and unsatisfactory and in some instances discriminatory, and were insufficient to provide a proper amount for the depreciation of the property employed in the public service and a fair return thereon. This application was made to the Commission because of a stipulation made by the corporation on December 20, 1907, and filed with the Commission on December 21, 1907, in a proceeding then pending before the Commis-

sion relating to the purchase of the properties of the Lockport Gas and Electric Light Company, hereinafter called the Gas Company, and the Economy Light, Fuel and Power Company, hereinafter called the Economy Company, by the petitioner herein, pursuant to which stipulation it agreed that it would not thereafter increase the rates therein set forth for the city of Lockport without the consent of the Commission. That case will be referred to as No. 74. An order was made by the Commission on the day the stipulation was filed permitting the Lockport Company to acquire the property of the Gas Company and the Economy Company upon condition that it would not thereafter increase the rates mentioned in the stipulation without the consent of the Commission, and those rates are the ones complained of in the 1914 proceeding.

In due course the City of Lockport engaged as its engineer in this case Mr. William McClellan, who was formerly the electrical engineer of this Commission, in order that its interests might be properly protected, and thereafter the case came on for a hearing. The city appeared by its corporation counsel in opposition to the proposed revision of rates, and ample opportunity was given to any of the interested parties in Lockport to appear and give evidence in opposition to any change in the then existing rates. However, no one appeared except the corporation counsel of the city, and its engineer, Mr. McClellan, who testified on behalf of the city. The last hearing in what may be termed the preliminary trial of this case was held in Lockport on July 12, 1915. Subsequent to that hearing the engineers of the city, the corporation, and the Commission had numerous conferences, and the facts in the case were considered at length for the purpose of endeavoring to agree on some schedule of rates which would be fair to all of the interested parties under the then prevailing business conditions. They finally succeeded in the month of September, 1915, in working out a new schedule of rates which it was believed would be a very great

30 PUBLIC SERVICE COMMISSION, SECOND DISTRICT

P.S.C. 2d D.

improvement upon the rates then in force in Lockport, and which would afford the company a fair return upon the value of its property then employed in the public service. We think it proper at this time to quote here the letter of Mr. McClellan dated September 22, 1915, those of Commissioner Carr dated September 27 and 30, 1915, and that of the corporation counsel of the City of Lockport dated September 29, 1915:

September 22, 1915.

The Hon. Roy H. Ernest,
Lockport, New York.

DEAR JUDGE ERNEST:

I have been giving much consideration to the very complicated question as to your electric rates in Lockport. I know you have a full realization of the difficulties which we have to meet. It is never easy to raise rates, but it is especially difficult when the rates in existence are so badly disorganized and inequitable among themselves as the rates in Lockport are.

I have been in consultation with the engineer of the Commission both in New York and in Albany. The question of value, operating expenses and earnings have been combed and recombed. Altogether some 20 or 30 different rates have been considered, including important suggestions made by the engineer of the Commission. In view of the conflicting elements involved in this settlement, it seems almost impossible to get a set of rates which may be regarded as logical among themselves and wholly satisfactory from the standpoint of scientific rate making. One can devise a half dozen sets of rates for the various kinds of business, each set of which would give practically the same total earnings. It is only by weighing the commercial and certain local relations of these various sets of rates that a choice can be made. Under these somewhat harassing circumstances I must very frankly advise you that the inclosed set of rates will accomplish what seems to be a necessary end, and with a very reasonable distribution of the burden upon the various classes of consumers. They are in part rates which I have recommended and in part rates which the engineer of the Commission recommended. When I parted with him yesterday, we were in agreement as to the greater availability of this particular set of rates.

I am not sure how the matter will come up for final adjustment, but I suppose the Commission will communicate with you. You recognize, of course, that the position of the Commission is intermediate between the company and the city, which is a rather difficult one to hold. To order an increase of rates in a community is not a particularly pleasant

LOCKPORT LIGHT, HEAT AND POWER CO.

31

Vol. VII.

act for any commission to have to perform, and therefore there are especial reasons for assuming that any rates which it orders will not be higher than what is necessary to permit it to carry out the other part of its responsibility, namely, to give the company justice. I suggest to you, therefore, that should you be approached by the Commission in connection with these recommendations, that you promptly and freely express your willingness to accept them if ordered by the Commission and thus permit the case to be closed without further delay.

Placing myself at your disposal for any consultation on this subject which you may want, or for any other purpose in connection with the case, I remain,

Very truly yours,

Wm. McCLELLAN.

Copy to Hon. James O. Carr,
Public Service Commission,
Second District, Albany, N. Y.

Case No. 4335

Albany, Sept. 27, 1915.

MR. ROY H. ERNEST,
Corporation Counsel,
Lockport, N. Y.

DEAR SIR:

I have before me the letter of Mr. McClellan to you under date of September 22, 1915, relative to proposed electric rates in the city of Lockport.

The engineers of the Commission have been in consultation with Mr. McClellan representing the city and with the engineers of the Lockport Company for the purpose of endeavoring to arrive at a solution of the problem in Lockport relative to rates. It seems to us as though the schedule submitted in the letter of Mr. McClellan is reasonable to both parties. We would like to be advised if the city will agree upon this schedule of rates as proposed. If this is not done, it will, of course, be necessary for the Commission to prepare a schedule of electric rates for the city of Lockport which it shall determine is equitable and just. It would, of course, be more satisfactory if such a schedule could be agreed upon between the parties and there seems to be no good reason why this can not be done. If, however, you advise us that this can not be accomplished, we will endeavor to dispose of the matter in the alternative way suggested. We will appreciate it if the matter can be decided promptly so the case may be disposed of by the Commission.

Very truly yours,

JAMES O. CARR,
Commissioner.

32 PUBLIC SERVICE COMMISSION, SECOND DISTRICT

P.S.C. 2d D.

Case No. 4335

September 29, 1915.

HON. JAMES O. CARR,
Public Service Commissioner,
Albany, N. Y.

DEAR SIR:

I have your letter of the 27th inst. relative to electric rates in the city.

In answer thereto permit me to say that some time ago the members of the Common Council and the representatives of the petitioning company made an effort to reach an agreement as to a schedule of rates for electricity and that such efforts were unsuccessful; that it was then understood that the whole matter was to be presented to the Public Service Commission for determination, which has been done.

The city has employed in this matter Mr. McClellan, an expert of much experience and ability, and relies upon his judgment as to what suggestion should be made to the Commission concerning changes, if any, in the present rates for electricity.

Furthermore, the Mayor and members of the Common Council have explicit faith and confidence in your Commission and are firmly convinced that any final determination which shall be made in the matter and schedule of rates which shall be ordered by the Commission to be put into effect, and which we will be compelled to accept, will do justice to the people of the City of Lockport.

Thanking you for the courteous treatment which you have already extended to us, I remain,

Yours very truly,
Roy H. ERNEST,
Corporation Counsel.

Case No. 4335

Albany, Sept. 30, 1915.

MR. ROY H. ERNEST,
Corporation Counsel,
Lockport, N. Y.

DEAR MR. ERNEST:

I am very much obliged to you for your letter of the 29th relative to the schedule of rates in the city of Lockport.

In view of all the circumstances and of the fact that the engineers of all parties are practically agreed upon the schedule, it would seem as though the Commission could properly make an order putting such a schedule into effect. I will endeavor to have this done within the next few days.

Very truly yours,
JAMES O. CARR,
Commissioner.

The Commission then made an order on October 5, 1915, fixing a new schedule of rates which might be put into effect in the city of Lockport by the petitioner. The Opinion of the Commission which was handed down on the same date is reported in Volume IV, Public Service Commission Reports, Second District, p. 623. The new rates were put into effect November 1, 1915.

The schedule of rates which the petitioner requested permission to revise, and the schedule authorized by the order of the Commission on October 5, 1915, are as follows:

Electric Rates in Force Prior to November 1, 1915.

Rates for Electric Lighting:

First 50 kw.h. per month or less, 10 cents per kw.h.
Next 50 kw.h. per month, 9 cents per kw.h.
Next 100 kw.h. per month, 8 cents per kw.h.
Next 200 kw.h. per month, 7 cents per kw.h.
Excess over 400 kw.h. per month, 6 cents per kw.h.

These rates are subject to a discount of 25 per cent if bills are paid on or before the tenth of the month following that in which current was consumed.

Rates for Electric Power:

First 1000 kw.h. per month or less, 2 cents per kw.h.
Next 1000 kw.h. per month, 1.5 cents per kw.h.
Next 1000 kw.h. per month, 1.2 cents per kw.h.
Next 2000 kw.h. per month, 1.0 cents per kw.h.
Next 5000 kw.h. per month, 0.8 cent per kw.h.
Next 10000 kw.h. per month, 0.75 cent per kw.h.
Next 20000 kw.h. per month, 0.7 cent per kw.h.
Next 40000 kw.h. per month, 0.68 cent per kw.h.
Excess over 80000 kw.h. as above, 0.64 cent per kw.h.

These rates are subject to a discount of 25 per cent if bills are paid on or before the tenth of the month following that in which current is consumed.

In addition to the regular meter rates for electric power, a service charge is made of 75 cents per average horsepower per month, as shown by the kilowatts consumed. Such consumers are divided into either ten or twenty-four hour consumers operating twenty-six working days a month. Dividing the number of working hours in the month into kilowatt-hours as shown by the wattmeter, and dividing this by 746 watts, gives the average horsepower, to which is applied the charge of 75 cents per horsepower per month. Such charge is in addition to the regular meter rates.

Power: Demand rate.

Available: For consumers using primary power and located convenient to the 11500-volt circuits.

Character of service: Continuous a.c. 25-cycle, 11500-volts, 3-phase.

Guarantee: 60 per cent of the maximum minute peak, as per rate below.

Rate: Demand rate (step) : 50 to 100 hp. peak at \$22 per hp. per year; 100 to 500 hp. peak at \$20 per hp. per year; 500 to 1000 hp. peak at \$19 per hp. per year; over 1000 hp. peak at \$18 per hp. per year.

Maintenance discounts: None.

Prompt payment discounts: None.

Electric Rates in Force Subsequent to November 1, 1915.

Residence Lighting: Available to all residence consumers.

Net consumer charge: 75 cents per month per meter installed.

Net energy charge: 5 cents per kilowatt-hour for first 35 kilowatt-hours per month per meter; 2 cents per kilowatt-hour for all excess.

Minimum charge: None other than consumer charge.

34 PUBLIC SERVICE COMMISSION, SECOND DISTRICT

P.S.C. 2d D.

Prompt payment discount: Gross bills to be rendered with 10 cents added to net consumer charge, and discounted to net rate if paid within ten days from date of bill.

Commercial Lighting: Available to all lighting consumers except residences.

Net rate: 10 cents per kilowatt-hour for first 60 hours use per month of demand; 5 cents per kilowatt-hour for next 60 hours use per month of demand; 2 cents per kilowatt-hour for all excess.

Minimum charge: \$1 per month per meter.

Determination of demand: Demand to be considered as 90 per cent of the total installed capacity; no installation to be considered as less than 1 kilowatt.

Prompt payment discount: Gross bills to be rendered with 1 cent per kilowatt-hour added to net rate for first 60 hours use per month of demand, and discounted to net rate if paid within ten days from date of bill.

Commercial Power: Available to all power consumers.

Net rate: 7 cents per kilowatt-hour for first 40 hours use per month of demand; 4 cents per kilowatt-hour for next 40 hours use per month of demand; 1 cent per kilowatt-hour for all excess.

Minimum charge: \$1 per horsepower per month for first horsepower installed; \$0.75 per horsepower per month for each horsepower or fraction thereof in addition.

Determination of demand: Demand will be considered as 75 per cent of the installed capacity if in one motor, and 65 per cent if in more than one motor. No installation to be considered as less than 1 kilowatt.

Prompt payment discount: Gross bills to be rendered with 1 cent per kilowatt-hour added to net rate for first 40 hours use per month of demand, and discounted to net rate if paid within ten days from date of bill.

Wholesale Light and Power: Available to all consumers willing to guarantee a maximum demand of five kilowatts.

Net demand charge: \$2.50 per month per kilowatt for first 5 kilowatts of maximum demand; \$1.25 per month per kilowatt for each additional kilowatt of maximum demand.

Net energy charge: 1 cent per kilowatt-hour.

Minimum charge: None other than demand charge.

Determination of maximum demand: Actual maximum demand to be determined by tests or measurement.

Prompt payment discount: Gross bills to be rendered with 25 cents per kilowatt added to net demand charge, and discounted to net rate if paid within ten days from date of bill.

Primary Power Rate: Available to all consumers using primary power and located convenient to the 11500-volt circuits.

Net rates: 50 to 100 hp. peak at \$22 per hp. per year; 100 to 500 hp. peak at \$20 per hp. per year; 500 to 1000 hp. peak at \$19 per hp. per year; over 1000 hp. peak at \$18 per hp. per year.

Minimum charge: Consumers must guarantee an amount equal to 60 per cent of the maximum one minute peak.

Determination of maximum demand: Actual maximum demand will be determined by measurement.

Prompt payment discount: None.

On December 6, 1915, the common council of the City of Lockport adopted a resolution directing the mayor and corporation counsel of the city to apply to the Commission for a rehearing in this matter in order that an opportunity might be given consumers to appear or be represented in the case. On December 7, 1915, members of the Carpenters Union and Joiners of Lockport filed with the mayor and common council of the City of Lockport a protest against the action of the Lockport Company in making an increase in its rates for electricity. On December 8, 1915, the Central Labor

Union of Lockport made a similar protest; and on December 17, 1915, the Lockport Building Trades Council filed a like protest and approved the action taken by the common council on December 6th, above referred to. Not until May, 1916, did the City of Lockport file its application for a rehearing in this case. The allegations in this application as well as the other two which are hereinafter referred to are all made upon information and belief. We quote the following from the application of the city:

7. That the average increase to consumers for lighting purposes is unknown to your petitioner but it is believed to be excessive, and the service charge of seventy-five cents is unjustifiable; that it falls upon that class of citizens who can least afford to bear the burden and has caused general complaint and much bitter feeling.

8. That in view of the fact that the revised rates have resulted in costing consumers of electricity for power purposes approximately double what they had theretofore been paying, your petitioner believes that some fundamental error must have entered into the calculations of the engineers who agreed upon said revised rates, or that the theory adopted by said engineers in determining said rates was erroneous or else that such theory has failed to work out in practice as was expected.

At the same time a similar application was filed by the Electric Consumers Protective Association, alleging that none of the members of that Association took any part in the proceedings before the Commission relating to an increase in rates, that the members had not had their day in court, and that an unfair and unreasonable advantage had been taken of them by the Lockport Company to their great injury, and asking that the rates be revised and reduced to a fair and equitable basis. On the same date the Lockport Board of Commerce, a domestic membership corporation having upward of five hundred members, filed a similar application much more voluminous and in great detail, in which it was alleged that prior to the time when the application was made for a revision of rates the superintendent of the Lockport Company, Mr. Kaltwasser, had appeared before the Board of Directors of the Lockport Board of Trade, the

36 PUBLIC SERVICE COMMISSION, SECOND DISTRICT

P.S.C. 2d D.

predecessor of the Board of Commerce, and had stated that the company—

had a large number of consumers whose consumption of electricity was so small that the company was serving them at a loss and that the purpose of the application was to revise its rates in such a way that said company would not be required to supply such customers at a loss and that the proposed revision would not affect other consumers or if it did affect them, it would be in the way of a reduction of rates, and that the same statement was made to other users of electricity in Lockport. The petitioner further alleged—that said statements of said superintendent were well calculated, if not so intended, to mislead and to lull the public to a sense of security and such was their effect and while the city government appeared in said proceedings and employed an engineer to look after its interest, still, owing to the fact that said statements to your petitioner through its board of directors was so generally understood and accepted, there was apparently no public or private demand for vigorous opposition to said application and as a result, a revision of rates was agreed upon by the engineer of the Lockport Light, Heat and Power Company and the engineer employed by the city.

14. That this Commission very properly assumed that the rates so agreed upon were fair and reasonable and approved the same. [The particular rates complained of were the service charge imposed upon residence lighting customers and upon commercial lighting consumers, and the demand charge on wholesale light and power customers. As a matter of fact, there was no service charge in the new rates for commercial lighting consumers.]

17. That said rates and charges have proved to be unfair, excessive, unreasonable, and have raised a storm of public indignation.

It was also alleged that there was no necessity for the company to maintain a steam plant in Lockport, and that this placed an undue burden upon the consumers of electricity there, and that the company should not be permitted to generate electricity by steam and charge the consumers therefor based upon the cost of steam generated electricity inasmuch as the company had an available supply of power from the Niagara, Lockport and Ontario Power Company, and that the primary purpose of the steam plant was to supply steam heat for use in the city of Lockport. The operations of the

company were criticised in various respects, and it was asserted that the values placed upon the property of the company employed in the public service were excessive and had been determined from time to time by the Commission "not simply for the purpose of fixing electric rates but rather for the purpose of borrowing money on said property, and that in the proceedings in which such valuations were determined, little or no question was ever raised as to such valuations by consumers who might be interested in keeping such valuations down where they belong". It was also asserted that since the rates were revised the company had been guilty of discrimination in certain respects, and that the increased rates had driven a number of concerns out of business.

The Lockport Company answered each of these petitions in due course, and filed such answers with the Commission on June 15, 1916, denying many of the allegations in the applications. The former superintendent of the company, Mr. Kaltwasser, made an affidavit squarely controverting the allegations to the effect that he had misrepresented the facts in regard to the proposed revision of rates and setting forth certain facts to show that the municipal authorities in Lockport were fully apprised of the proceedings which were being taken by the company for the purpose of obtaining a revision of rates, and that the matter had been given considerable publicity in Lockport through the medium of the newspapers and otherwise. It may or may not be significant that no one appeared at any of the hearings before the Commission subsequent to June, 1916, to give evidence in support of the charges made against Mr. Kaltwasser, and from the record in this case we believe it can fairly be found that ample notice was given to the people of Lockport of the application to the Commission for a revision in rates, and it is of course a matter of record that the common council of the city took the necessary steps to have the city ably represented in the matter.

Just how much disaffection was actually caused by the revised schedule of rates which was approved by the Commission in October, 1915, does not appear anywhere of record in this case except through statements of counsel, but it is interesting to note that it was considered of sufficient importance by the so called "Thompson Investigation Committee" to justify it in calling upon the Commission to deliver to it in the month of December, 1915, all of the records of the Commission in this case, as well as several of the papers in case No. 74, hereinbefore referred to, and for the Committee to hold a session in the city of Lockport in June, 1916.

The first hearing was held on Friday, June 16, 1916, and continued on the following day. At these sessions many of the records of the Commission were incorporated into the minutes of the proceedings of the Committee, and witnesses were subpoenaed by the Committee to appear and testify. None of these witnesses gave any evidence which would in any way tend to substantiate the charge that the rates fixed by the Commission were unjust or unreasonable or in any way prejudicial to the interests of the City of Lockport, or that the Commission had erred in its determination.

The minutes of these sessions in Lockport will be found on pp. 1232-1303 inclusive, and pp. 1-105 inclusive, of Volumes V and VI respectively, of the Report of the Joint Committee for the year 1916. We quote the following from pp. 119, 120 of the report of the Joint Legislative Committee transmitted to the Legislature on March 5, 1917:

The City of Lockport, through its Common Council, protested against the rates for electric light and power and applied to the Commission for relief. It applied to the Commission for experts to develop the facts. These were denied by the Commission with the excuse that the force was busy and that in any event the Commission should not take part in the controversy. Facing a rate case, the company with the assistance of the Commission made *ex parte* re-location of the property used in the service, and then it applied for a rate readjustment. The city administration was obliged at large expense to employ experts and then made a perfunctory contest, and the net result was that the city's

efforts to reduce electric costs produced an increased income to the electric company of \$42,000 per year, and this by order of a Commission charged by the law with the responsibility of making its own investigations to arrive at the facts pertinent to the subject matter of pending complaints.

The details of this proceeding are obtainable in the record of the Committee's investigation of the Lockport Rate Case. The investigation resulted in a rehearing being granted in June, 1916.

We believe it the duty of the Commission to vigorously refute the assertions made by this Committee that its investigation in the Lockport case resulted in a rehearing being granted in that case in the month of June, 1916, or had anything whatever to do with it. The fact is that the applications for such rehearing were not presented to the Commission until the 22nd day of May, 1916; they were served on the corporation on the 24th day of May, 1916; the Commission notified the company that it should answer the complaints within twenty days from the 24th day of May, and notwithstanding the company urgently requested further time within which to answer the allegations set forth in the applications because of the charges therein set forth, an extension of time was refused, and the Commission did on June 14, 1916, fix the 20th day of June, 1916, as the day when the parties would be given a hearing in Albany for the purpose of enabling the Commission to determine whether or not a rehearing should be granted; and on the day when such hearing was held and at its close, the Chairman of the Commission made the following statement:

Well, gentlemen, we of course can not pass upon these contesting affidavits. I do state, with my associates' approval, that we are not of opinion that there has been any misrepresentation by the company; we never cherished such an opinion before the hearing or since the statements which have been made today have come to our attention. But upon the application of the city and because of the attitude of the city toward this proceeding, we are inclined to reopen this case, grant a rehearing and afford the city and these petitioners an opportunity to present evidence in the matter. Such an order will be entered.

We have referred to these matters at some length because

40 PUBLIC SERVICE COMMISSION, SECOND DISTRICT

P.S.C. 2d D.

we think the usefulness of this Commission would be materially affected and it would fall into disrepute if the feeling should spread broadcast that the determination of the Commission in any particular case or in any branch of its work could be successfully influenced by a Legislative Committee or any of its members. The Commission started out with high standards when it was first created in 1907, and it has always endeavored to maintain them and we confidently believe it always will.

It was July, 1917, more than a year after the aforesaid hearing, before the parties were prepared to go ahead with the matter before the Commission, and then protracted hearings were held in Albany covering thirteen days altogether. Notwithstanding the storm of indignation which it was stated existed in Lockport because of the revision in rates, none of the users of electricity in that city saw fit to appear before the Commission and present any facts which would be of assistance to it in determining whether or not the rates were in fact unreasonable. Statements at considerable length were made by counsel for the city and the associations hereinbefore mentioned, but the only witnesses who appeared and gave evidence in their behalf, other than a real estate agent who testified as to land values, were the city's second engineering expert, Mr. Ballard, and his assistant, Mr. Hesselman. More than eighteen hundred pages of testimony have been taken in this case and many exhibits containing masses of figures were introduced in evidence by both sides in the effort to support their respective contentions. Briefs were filed with the Commission and oral argument was made on December 5, 1917. Reply briefs have also been filed by both sides.

A careful study of the record leads us to believe that the solution of the problem is not nearly as difficult as it might seem from a cursory examination of the evidence of the experts who testified and the figures submitted by them.

There is no complicated question of law involved, but merely one of facts.

There is probably no gas and electric company in the State of New York which has been before the Commission so much since 1907 as the Lockport Company. One of the first cases before the Commission was its application for permission to purchase the property of the Gas Company and the Economy Company, both of which were then engaged in the electric light, power, and steam heating business in Lockport. The Gas Company and its predecessors had been engaged in business in Lockport for more than fifty years. The Economy Company was an off-shoot of the American District Steam Company which was engaged in furnishing steam heat in Lockport in 1905 at the time the Economy Company was formed. While it has been asserted time and time again that the Economy Company was created in good faith to engage in the electric light and power as well as the steam heating business in the city of Lockport, yet we think it may fairly be inferred from all that has transpired that the real purpose of this company was to obtain a franchise in Lockport if possible, and then begin competition with the Gas Company with a view to forcing that company to buy the property of the Economy Company or sell out to it. Be that as it may, the fact is that the common council of the City of Lockport granted a franchise to the Economy Company on October 16, 1905, which enabled it to actively compete in the electric light and power business with the Gas Company, and this condition of affairs continued until 1907, when it was apparent that the two companies could not obtain sufficient business in Lockport to justify the existence of the two companies as separate entities, and as a result, the Lockport Company was formed to take over the property of the two companies and end the then existing competition. The proceeding to effect a sale of the two companies to the Lockport Company was commenced before the Commission of Gas and Electricity, and when the Public

42 PUBLIC SERVICE COMMISSION, SECOND DISTRICT

P.S.C. 2d D.

Service Commission was formed, this was one of the cases turned over to it and was one of the first to receive its attention. It was given thorough consideration by the Commission as appears from the Opinion in the case which is reported in Volume I, Public Service Commission Reports, Second District, p. 12. At that time the Commission was blazing the trail in matters of this character and had no established precedents of its own to follow. The questions then under consideration were new to the Commission and required an interpretation by it of the law relating to such matters. The question of determining just and reasonable rates was not the one that was being pressed for determination, but rather what capitalization would be proper for the new company. While it is true that the company was required by the Commission to continue in force the rates then existing in Lockport, yet it appears that this was done largely because of the fact that vigorous opposition was made to the proposed combination of the companies by the people in Lockport on the ground that this would tend to reduce the competition between the two companies, which it was considered was for the best interests of the people there, and that the franchise had been granted to the Economy Company upon the distinct understanding that it would actively compete with the Gas Company. The question involved was the capitalization of the new company, and whether or not there was sufficient property to justify the proposed issue of stock and bonds. The rate question was only brought in as a collateral matter. Certainly the Commission did not attempt to determine at that time that the rates then in force in Lockport should continue forever without change. We think it desirable to quote from the Opinion in case No. 74, as follows:

The petitioner, the Lockport Light, Heat and Power Company, desires to take over the property, franchises, and business of these two companies and carry on the business of supplying gas, electric light and power, and steam heat, in Lockport through the agency of a single corporation. The capital stock of the new corporation, as proposed by the petitioner, the Lockport Light, Heat and Power Company, is to be

LOCKPORT LIGHT, HEAT AND POWER CO. 43

Vol. VII.

\$600,000, and the company also asks leave to issue \$600,000 of bonds, making the total proposed capitalization of the new company \$1,200,000. The total capitalization of the two old companies whose properties and franchises are to be taken over is, as appears from figures given above, \$700,000.

This Commission in July caused an examination to be made of the properties of the Economy Light, Fuel and Power Company and the Lockport Gas and Electric Light Company. The Commission's engineer values the physical property of the Economy company, with no allowance for franchise or good will, at \$291,579.39. As heretofore stated, the capital stock of the Economy company is \$250,000, and it has no outstanding bonds. The Commission's engineer values the physical property of the Lockport Gas and Electric Light Company, with no allowance for franchise or good will, and without attempting to place any value on the Beverly contract for water power, at \$433,426.33. The value of the Beverly contract is difficult to estimate. The total capitalization of this company is \$150,000 outstanding capital stock and \$300,000 outstanding bonds. The total physical valuation of both properties found by our engineer is \$725,005.72, and the total outstanding bonds and stock as follows:

Outstanding stock of both companies.....	\$400,000
Outstanding bonds of both companies.....	300,000
Total	<u>\$700,000</u>

The properties are to be turned over to the new company free of lien or debt, except the outstanding bonds of the gas company.

First, the city objects on the ground that the two companies whose business is to pass over to the new company have now a total capitalization of \$700,000, while the new company proposes a total capitalization of \$1,200,000. The municipal authorities urge that if the last named capitalization is allowed by this Commission, it will hereafter be claimed that the company is entitled to charge such prices for its products as will enable it to earn a fair return upon such capitalization, and that this would result in gross injustice to the City of Lockport and its inhabitants.

Section 69 of the Public Service Commissions Law, which relates entirely to gas and electric corporations, contains the following prohibition:

Nor shall the capital stock of a corporation formed by the merger or consolidation of two or more other corporations exceed the sum of the capital stock of the corporations so consolidated, at the par value thereof, or such sum and any additional sum actually paid in cash; nor shall any contract for consolidation or lease be capitalized in the stock of any corporation whatever; nor shall any corporation hereafter issue any bonds against or as a lien upon any contract for consolidation or merger.

Technically speaking, the case in question is neither a consolidation

44 PUBLIC SERVICE COMMISSION, SECOND DISTRICT

P.S.C. 2d D.

nor a merger, but the purchase by a newly formed corporation of the property and franchises of two existing companies. It will be observed also that the prohibition of the statute is confined to an increase in a merger or consolidation of "capital stock," and such prohibition does not expressly apply to increase of bonded indebtedness. The purpose behind the statute, however, is perfectly clear. The provision of law in question is designed to prevent those large increases of capital issues which have so often accompanied the consolidation of public service corporations in the past, and which have imposed heavy burdens upon municipalities in the way of inadequate service and excessive prices through the endeavor by the over-capitalized company to earn interest and dividends on the excessive issue of securities. If this beneficent purpose of the statute can be evaded simply by effecting consolidation in fact by the use of a newly organized purchasing company, without technical merger or consolidation of the existing companies; or if it can be evaded by leaving the aggregate capital stock unchanged, but imposing the same burden upon the community through a greatly increased issue of bonds, the statute totally fails to accomplish the intended purpose. We think it quite clear that the policy of this Commission, in case two or more gas or electric companies in any community are permitted to sell out their property and franchises to one newly formed company, should be to disapprove such sale, unless the total capitalization of the consolidated or new company, whether in stock or bonds, issued in exchange for the securities of the old companies, is kept at such an amount as not to exceed the total capitalization of the vendor companies. The aggregate capitalization — stock and bonds — of the Economy Light, Fuel and Power Company and the Lockport Gas and Electric Light Company at the present time is \$700,000. The newly organized company, formed to buy out these two companies, should not, therefore, be permitted to issue more than \$700,000 of stock and bonds for the purchase of the old companies. It is not important how this capitalization is divided as between bonds and stock. We see no objection to the new company issuing, to consummate these purchases, if they are to be permitted at all, \$550,000 of bonds and \$150,000 of capital stock. The new company would have assets representing the full amount of such issues of stock and bonds at their par value, making no allowance or valuation for its established business relations with its customers and contracts with the city authorities, both of which have in fact a real and substantial money value.

The prices fixed by the Commission are to be the maximum prices to be charged for gas or electricity in such municipality until the Commission shall, upon complaint or upon investigation conducted by it on its own initiative, again fix a different maximum.

Vol. VII.

The petitioner in his brief in this case states that the new company is willing to file a written stipulation or agreement with the Public Service Commission that it will not increase the present schedule of rates on electricity and gas in the city of Lockport without first obtaining the consent and order of the Public Service Commission permitting such increase. . . . In case of any increase hereafter in the price of gas or electric light or power in the city of Lockport, the municipal authorities and citizens would have full power to bring the matter before the Public Service Commission in the manner provided in section 71, and such proceeding would find on file with the Public Service Commission a written stipulation and agreement of the companies not to increase their prices without obtaining previous consent from the Commission. The provision for future application to the Commission for permission to change prices is clearly necessary to cover changes of condition which might develop in the future, as for example, an important increase in the cost of producing gas or electricity.

Regulation of public service corporations has developed the fact that competition and regulation do not go hand in hand but are directly antagonistic to each other, and it has also been demonstrated times without number that two electric light and power companies, whose entire business is confined to a city as small as Lockport, can not successfully compete and earn a fair return upon the capital invested unless they charge excessive rates for the service performed. There is a needless duplication of property which is entirely unnecessary, and sooner or later one or the other of the companies must go to the wall and the public must bear the burden made necessary by inviting and fostering competition of this character. Lockport is a concrete illustration of that fact. If the City of Lockport had refused to grant the franchise to the Economy Company, thus enabling it to compete with the Gas Company, the question of the necessity for the maintenance and operation of the present steam plant would probably not have been involved in the question of rates for electricity in Lockport. However, the franchise was granted and each of the companies was obliged to fight for its existence,

Therefore, in view of what has transpired, and inasmuch as the city granted the franchise for the steam heating business as well as electric light and power business to two different corporations, it can not now successfully urge that the owners of the property which was installed for the benefit of the people in that city should not be allowed to earn a fair return upon the value of the property employed in the public service. This is a situation which was created by the City of Lockport alone, and the owners of the property must be allowed a reasonable opportunity to work out of the difficulty. It is a well known fact that a concern like the Lockport Company can not always be assured that it will have a never failing supply of hydro-electric power even though it does come from the mighty Falls of Niagara. Delays and interruptions are a necessary incident to the business of transmitting electric energy from the source of supply to the point of distribution over long transmission lines; they are in most instances inevitable. When this happens, all the industries dependent upon this power are subject to serious loss and inconvenience even if the interruption in the service is only of brief duration. There is hardly an electric light and power company of any consequence in the State which purchases hydro-electric energy for distribution which has not some sort of steam reserve to back it up for the purpose of taking care of interruptions as well as to cut down the peak inasmuch as hydro-electric power is usually sold on the basis of the peak-load demand. It may be that the steam plant will not be called on for weeks at a time to supply electricity because of the failure of the hydro-electric energy, but when it is needed, it is there ready for use, and it enables the company to continue to supply its customers and reduce serious losses which might result if power were not immediately available. It is considered good engineering practice to have such a steam reserve, and we have found nothing in the record which would justify us in holding to the contrary. Since the application in this case for an increase in rates

was made, and as showing the fallacy of the argument that where power from Niagara is available, as in the present case, it is unnecessary to have any steam reserve, there has been developed almost at the brink of Niagara Falls, so to speak, a tremendous steam plant: and this has been done not only for the purpose of insuring a continuous supply of power in Buffalo and vicinity but also to supplement the resources of Niagara Falls; and this development was decided upon before the beginning of the present European conflict. In addition to this, another one of the large power companies distributing electricity generated at Niagara Falls has found it extremely desirable to have a large steam plant at Lyons, N. Y., to take care of interruptions in its source of supply and on its distributing lines, and also to eke out the supply which is available from Niagara Falls at times of peak demand. Added to this, the fact that the power from Niagara Falls has been diverted to uses which are considered of great importance by the Government in these strenuous times, and that the supply of energy from this source is also being materially cut down, and none of the power at Niagara may in the near future be available for Lockport, we think that the fact that there is a steam plant for use in Lockport is of very great importance to the city and its inhabitants and the industries therein, and that the city as well as the company is fortunate in having such a plant available for use continuously if the demand arises. We say this with all due respect to the last engineer which the city employed in this case, Mr. Ballard, from whose testimony it might almost be inferred that a steam plant for generating electricity in Lockport is entirely unnecessary.

The first engineer employed by the city, Mr. McClellan, is a man of excellent reputation as an engineer. He was fully competent to advise the city in this case, and we believe that the advice which he did give it was sound and reasonable. The fact that the representatives of the city have been dissatisfied with that advice does not alter the fact in any way,

48 PUBLIC SERVICE COMMISSION, SECOND DISTRICT

P.S.C. 2d D.

Merely because the advice which we receive from an engineer is not to our liking, does not establish satisfactorily that the advice is unsound or unfair where there is not satisfactory proof that his findings are incorrect or not based on facts. Mr. McClellan has been very severely criticised in this case, but we think this criticism has been unwarranted by the facts. We think it proper at this time to quote from the report made by him to the City of Lockport with regard to the necessity and justification for a steam plant in Lockport:

A steam plant is necessary for a proper electric service in the city of Lockport. In the first place, the conditions of the contract of the company with these companies which supply it with power from Niagara, include that the power may be taken off from 1 a. m. and 5 a. m. any day. The power from this source may be cut off accidentally at any time for a more or less protracted period, especially under severe weather conditions. It is desirable that the street lighting and lighting in buildings where crowds are likely to be, should not be cut off. It is true that the city of Buffalo nearby has no auxiliary plant. There are, however, two distinct transmission lines over separate rights of way from Niagara Falls, on opposite sides of the Niagara river. There is also a very large direct current system in the busy portion of the town supported by large storage batteries.

In addition to these circumstances it must be remembered that the investment in the plant is made. The plant has also a practical advantage in that it can be used to cut off the peak of the demand for power purchased under contract. It is extremely difficult to tell whether this will save the company money, or not, under the new contract conditions. Undoubtedly if the company used the plant for twelve months in the year, the peak could be kept down. It would take a large amount of investigation, however, and perhaps experiment, to determine if it would be profitable to run the steam plant for this purpose during the summer months when the extra steam could not be used for any profitable purpose. We have not thought it desirable or necessary to expend the time and money on this point when the results would necessarily be unsatisfactory to determine how the investment in the steam plant should be allocated between the electric and steam services.

The Elm Street plant is designed for this particular purpose. The efficiency of the plant as a power generating plant is not high, and is correspondingly less expensive than would be a highly efficient steam generating plant. This is as it should be. We are of the

Vol. VII.

opinion, therefore, that all of the engine room equipment should be allocated to the electric department.

The boiler room must be treated somewhat differently. It is very efficient, well equipped, and designed to make steam very cheaply. The boilers are equipped with stokers. It is probable that a boiler plant for an auxiliary steam plant would not be built in this way, but the difference in cost would not be material. The stokers might be used in such a plant or they might be omitted, according to the whim of the designing engineer.

According to one point of view, therefore, we might allocate all the boiler plant and steam engine plant with the exception of the stokers to the electric service and debit the heating plant with the stokers for the reason that they would be installed only for the continuous generation for steam heating purposes, and in order to reduce as far as possible the expenditure for coal and labor in the manufacture of steam.

We can not convince ourselves, however, that this is an equitable solution. There are two distinct sets of customers, each set desiring to get its service at the lowest possible cost. If a separate company were providing the steam service, they would have to build a boiler plant. We have agreed above that an independent electric company would have to build a boiler plant for auxiliary service. There is a tendency for the electric consumers to regard the steam as a byproduct. There is no reason at all, however, why a steam company should not put its steam through a power generating plant, regarding the power as a byproduct instead of feeding the steam directly into its mains. We have met this same difficulty before in tabulating the cost of lighting and heating in large office buildings.

There does not seem to be any scientific or truly logical way of allocating the costs of this boiler plant between the two services. There is not sufficient data. In such cases it is necessary to compromise: We are inclined to think that the best solution is to imagine that two companies are preparing simultaneously to give the two services, and suddenly perceiving that each one is investing his money in a separate boiler plant, decide to open negotiations by which one boiler plant will be built, each paying half. If such a hypothesis be reasonable, and we think it is, it is proper for us, without attempting to split hairs, to regard half the boiler plant as belonging to the steam plant.

Steam Generation, \$19,056.55: There is no question that a part of this cost must be charged out to the steam heating department. In this application the company has charged out 44½ per cent of the ~~same group of expenses~~ for the year 1912,

50 PUBLIC SERVICE COMMISSION, SECOND DISTRICT

P.S.C. 2d D.

As stated above, this steam plant can be used as a straight reserve, operated only when the power supply from Niagara Falls is cut off, or it can be operated so as to reduce the peak of the power purchased from Niagara Falls. There is not information, however, available to determine which would be better operation. We have figured that if this plant were operated as a simple reserve for emergency purposes, approximately 70 per cent of the total operating expenses might be charged to steam. On the other hand, if operated to reduce the peak demand of purchase power, apparently 40 per cent would be charged to steam reserve. For the purpose of this general study, therefore, we shall assume that 50 per cent of the total operating expenses of this station should be charged to the steam heating department.

A great deal has been said in this case with regard to the contracts made by the company for its supply of Niagara power and the price paid for such power. Considerable of this is ancient history, and deals with conditions which existed long prior to the time when this Commission was created or the Lockport Company had been brought into existence.

On October 10, 1905, a contract was entered into between the Lockport Gas and Electric Light Company and Niagara, Lockport and Ontario Power Company (hereinafter called the Niagara Company) covering power supplied by the Niagara Company at \$16 per hp. This contract was subsequently assigned to the Lockport Light, Heat and Power Company. Prior to January 15, 1915, the Lockport Company had taken power under this contract up to about 3000 hp. At that time the International Power and Transmission Company (hereinafter called the Transmission Company) was a corporation owning a small amount of property but really acting as a broker for electric power on the outskirts of Lockport, and it was supplying electric energy to three large power consumers. It had a contract with the Niagara Company bearing date April 7, 1906, under which it could obtain a maximum of 20,000 hp. from the Niagara Company at \$16 per hp. The Transmission Company also has a supplemental agreement with the Niagara Company pursuant to which it receives an allowance or commission from

the Niagara Company of 50 cents per hp. on all power purchased by it from the Niagara Company, or which may be sold by the Niagara Company to the Lockport Company or anyone else in Lockport. The Transmission Company prior to January 15, 1915, had taken power under its contract to the extent of about 2000 hp. A dispute had arisen between the Lockport Company and the Niagara Company as to the amount of power which the Lockport Company was entitled to take under this contract at the rate of \$16 per hp. The Niagara Company insisted that it was not obligated to supply more than 1000 hp. at this price, and that the Lockport Company must cease to take power in excess of that amount unless some special arrangement was made therefor in respect to price. The only other cheap power which was available in that locality was that controlled by the Transmission Company, and it would appear that the object of the Niagara Company was to compel the Lockport Company and the Transmission Company to include in the 20,000 hp. block of the Transmission Company all power required by the Lockport Company in excess of 1000 hp. We say this because the parties then in control of the Transmission Company were also largely interested in the affairs of the Lockport Company. Then again this attitude on the part of the Niagara Company was not altogether unreasonable because it had a definite fixed contract with the Transmission Company calling for a maximum of 20,000 hp. only a small portion of which had been used up to that time, and the demands of the Lockport Company, as hereinbefore stated, had been in the neighborhood of 3000 hp., and there seemed to be no good reason why these demands should not be combined, there being no evidence that the Transmission Company would call for any increased amounts of power under its contract in the near future, and there being an opportunity for the Niagara Company to dispose of all surplus power which it might have available. In other words, the Niagara Company wished to have definitely determined

52 PUBLIC SERVICE COMMISSION, SECOND DISTRICT

P.S.C. 2d D.

what its obligations were with respect to the amount of power which it might be called on to furnish, in Lockport as well as elsewhere.

On January 15, 1915, a contract was entered into between the Niagara Company, the Lockport Company, and the Transmission Company which provided that the Lockport Company should take all of its power in excess of 1000 hp. from the Transmission Company, the power so taken to be considered as a part of the power covered by the contract between the Transmission Company and the Niagara Company. On the same date a contract was entered into between the Lockport Company and the Transmission Company under which it was agreed that the Lockport Company should pay the Transmission Company \$18 per hp. for the power taken under that contract.

If the Lockport Company had been entirely independent of the other two corporations and had been dealing with them at arms length, we might presume that the action which it took was necessary and advisable. So far as we know there was no community of interest between the Lockport and Niagara Companies, but the situation was different as regards the relations of the Lockport and Transmission Companies. The Lockport Company now owns all the stock of the Transmission Company, and at the time in question the Transmission Company stock was held by individuals who exercised a great, if not controlling, influence on the actions of the Lockport Company. It therefore becomes necessary for us to consider whether the Lockport Company was justified in allowing its contract with the Niagara Company to be limited to 1000 hp. without a contest, and whether the price charged the Lockport Company by the Transmission Company for power was just and reasonable, so that the full amounts paid by the Lockport Company for such power can fairly be included in its operating expenses.

It must be admitted that there is room for argument as to whether the 1905 contract between the Niagara Company and

the Lockport Gas and Electric Company, and assigned on January 22, 1908, to the present Lockport Company, entitled the latter company to unlimited power or whether its rights were limited to a maximum of 1000 hp. A careful study of this contract, however, leads us to believe that it was intended that the Lockport Company should have all of the power which it might require for the purposes of its business at \$16 per hp. This is borne out by the fact that this was to be the price for the quantity which was first definitely fixed, and the Lockport Company was obligated to buy its additional power from the Niagara Company. We seriously doubt whether the Lockport Company was justified in giving up this apparent right and then attempting to collect from its consumers any excess amounts involved in the payment of a higher price at least until some attempt had been made to uphold its rights under this contract. Pursuing the matter further, we find that under the contract of January 15, 1915, the power continued to go to the Lockport Company just as it did before. The Transmission Company was not obliged to make any additional investment so far as we are advised. Apparently the only expense involved in furnishing to the Lockport Company a portion of the large block of power which the Transmission Company had hitherto been unable to sell, consisted in taking the bills rendered to the Transmission Company by the Niagara Company, adding \$2 per hp., passing them along to the Lockport Company, and receiving payment from the Lockport Company at the increased price. The allowance of 50 cents per hp., which the Transmission Company received from the Niagara Company under the supplemental agreement, would have amounted to over \$1000 in 1915, and over \$1300 in 1916, and this would certainly have been ample to pay it for all the expenses involved in supplying power to the Lockport Company as well as a return on any investment which might have been involved. In this connection, however, we must call attention to the fact that since the Lockport Com-

54 PUBLIC SERVICE COMMISSION, SECOND DISTRICT

P.S.C. 2d D.

pany has acquired ownership of the Transmission Company's stock, which occurred in 1916, the Transmission Company has been billing the Lockport Company at \$16 per hp., and figures which we have obtained for the year 1917 show that the Transmission Company has a substantial net income derived from its other business and from the 50 cents allowance.

The additional price was only paid by the Lockport Company during the years 1915 and 1916, but these years materially influence the disposition of this case, particularly as most of the figures herein have been based on operations for 1916. Under the circumstances which we have related, we do not believe that the consumers of electricity in Lockport should be burdened by the additional amounts paid by the Lockport Company for power during these years, and we have adjusted the Lockport Company's reported operating expenses accordingly. The adjustments involved are as follows:

	<i>Paid Transmission Company for power</i>	<i>Amount allowed</i>	<i>Adjustment</i>
1915 : :			
1916 : :	\$88,692 47,490	\$84,898 42,213	\$4,800 5,277
	<i>Total paid for electric power</i>	<i>Amount allowed</i>	<i>Adjustment</i>
1915 : :			
1916 : :	\$47,556 57,584	\$43,256 52,807	\$4,800 5,277

It should be mentioned here that the city made no such corrections in its presentation of the case, although its counsel did call attention to the matter of power contracts in his argument. In the exhibits prepared by Mr. Ballard he used the exact amounts reported by the Lockport Company as having been paid for power, and he stated on examination that he was not familiar with the contracts and did not consider them important, but we are unable to agree with that conclusion.

The city has well said, in its reply brief in this case at page 1 —

The question involved in this case will never be settled until it is settled right. And the only way in which it can be settled right is

Vol. VII.

by getting down to and dealing with fundamentals. And the first great fundamental that must be dealt with and disposed of is this: What was the fair value in 1907 of the electric properties taken over by the present company? With that question settled, everything else will be detail and easy of solution as there have been no marked changes in conditions since then.

The Commission fully approves of this statement, and it believes that when this case is finally determined it will be determined right and that its findings will be just and fair to both parties. In a controversy such as this one we feel that this is an extremely difficult matter because of the apparent differences of opinion on various facts which seem to have been established in this case.

We have endeavored to determine the present value of the property of the Lockport Company used in the electric light and power department in several different ways, and the result which has been obtained satisfies us that the conclusions which we have reached are as nearly correct as it is possible to have them in a case which presents as many complications as the present one. The first time the affairs of this company or its predecessors were before the Commission it seemed to be necessary to ascertain what property the constituent companies owned and the value of that property so it might be determined whether the corporation was justified in issuing the amount of capital asked for in its petition. For the purposes of that case the property was valued by Mr. Crowell, who was then the engineer of the Commission. Probably the first work which he undertook after he became associated with the Commission was the examination of the Lockport properties. Prior to his connection with the Commission he had for many years been engaged in the electrical business and was familiar with the electric light and power development and the expenditures incident thereto practically from the beginning of the electrical industry on a large scale, so that he had an extensive knowledge concerning the costs of labor and material and other expenses incident to the construction of electric light and power plants and distribution

systems. With this in mind we think we may properly infer that the values which he placed upon the Lockport properties did include such ordinary physical overheads as might be properly allocated to the property, and that he intended the values determined by him to represent the value of the property as it then existed, and his report so states. In other words, the values given in his report are the depreciated values of the property including the overheads which he considered properly applicable thereto. If the conclusions which we have reached in this respect are correct, then of course the only depreciation which we are required to consider in connection with the Crowell valuation is that which has accrued since July, 1907. We have taken his report which bears date July 22, 1907, segregated the items pertaining to the electric department, and have added to them the various net amounts expended by the company from January 1, 1908, to December 31, 1916, as shown on the books of the corporation, for the purpose of ascertaining how this compares with the book values of the company, taking the 1912 allocation approved by the Commission as a starting point. The figures used for this purpose are set forth in the tabulation folder facing this page.

It will be noticed that on the basis of the Crowell report the value of the property December 31, 1916, was \$474,854.52, and that the comparable figures on the company's books show a property value of \$439,564.11 as of the same date. In this statement nothing has been allowed for working capital in either set of figures, nor in the company's figures for the various overheads which it is claimed should be allowed in this case. In arriving at these values we have allocated the power plant buildings on the basis of 30 per cent of the value of the buildings at the Elm Street plant to the engine room, and 70 per cent to the boiler room. We have assumed that all of the engine room should be charged to the electric department, while the boiler room should be charged one-half to the electric department.

CROWELL REPORT JULY, 1907

Economy Light, Fuel and Power Co.

*Land \$15,000, divided same as building.

*Buildings, including architects' fees and interest during construction, \$34,300, apportioned on basis of floor space 30% for engine room, 70% for boiler room.

Electric plant, \$10,350, ½ electric, ½ steam, plant \$5,200, ½ electric.

Construction account \$21,907.53, ½ electric

70% for boiler room \$24,150, ½ electric.

Net additions to electric fixed capital 7/1/07 to 12/31/12

44% of net additions to general structures, etc., 7/1/07 to 12/31/12.

Net additions to electric fixed capital 12/31/12 to 12/31/16

44% of net additions to general structures, etc., 12/31/12 to 12/31/16.

Total..... \$474,884.53

Lockport Gas and Electric Light Co.:

Electric transmissions and transformer house..... \$10,465.00

Electric distribution system..... 76,600.00

Electric station..... 82,975.00

Office furniture..... 750.00

No allowance made for materials and supplies or other working capital

Net additions to electric fixed capital 7/1/07 to 12/31/12

44% of net additions to general structures, etc., 7/1/07 to 12/31/12.

Net additions to electric fixed capital 12/31/12 to 12/31/16

44% of net additions to general structures, etc., 12/31/12 to 12/31/16.

Total..... \$446,920.00

TABULATION A

COMPANY, 1912 ALLOCATION
(With transfers between accounts as made in Case No. 5769.)

Electric Department:
*Land devoted to electric operations.

Elm Street land \$5,000, divided same as building.....

Market Street land..... \$3,900.00

*Power plant buildings: Building proper \$30,825, 30% for engine room, 70% for Boiler room, ½ electric, \$13,045, ½ electric

Coal trestle, stacks, etc., \$13,045, ½ electric

Furnaces, boilers, and accessories \$49,065, ½ electric.

Steam engines.....

Electric generators.....

Accessory electric power equipment.....

Miscellaneous power plant equipment.....

Substation buildings.....

Substation equipment.....

Poles and fixtures.....

Underground conduits.....

Transmission system.....

Distribution system.....

Line transformers and devices.....

Electric services.....

Electric meters.....

Electric meter installation.....

Municipal street lighting system.....

Commercial arc lamps.....

Glower lamps.....

Electric tools and implements.....

Electric laboratory equipment.....

Total..... 1,114.00

\$344,117.32

General
Land..... \$12,000.00

General structures..... 27,300.00

General equipment..... 7,620.00

\$46,920.00, 44% electric.

Total..... 20,644.80

* Divisions made by the Commission for this case.

† Contains only described proportions of expenditures for buildings and boilers.

<sup>† Net additions to electric fixed capital 12/31/12 to 12/31/16.
44% of net additions to general structures, etc., 12/31/12 to 12/31/16.</sup>

Total..... \$349,564.11

<sup>\$374,762.12
64,386.92
415.07</sup>

and one-half to the steam plant. We have also allocated one-half of the furnaces, boilers, and accessories to the electric plant and one-half to the steam plant. We are of the opinion that Mr. Crowell in his report estimated the value of the property as it then existed and including something for overheads as we have hereinbefore stated. Just how much this was we are unable to determine, but inasmuch as he stated that the valuations are intended to represent "physical values of going concerns and the equipment is assumed to be in good operating condition," we think he did include in these values some of the overheads which were commonly known in the industry at that time. Since then there has been a much greater development in the matter of overheads due largely to engineering investigations, the improved methods of determining costs of reproduction of electric plants, and to improved methods of bookkeeping, and it is quite probable that he did not include all of the overheads which are now usually recognized in rate cases. We say this advisedly because we know that there are many expenses incurred in building up a property of this character which were not given as much consideration in the early days of regulation as they are at the present time. The figures representing present values, as set forth in this tabulation, do not take into consideration the question of the amount of depreciation which should be deducted from the property values shown. The difference between the totals, amounting to something like \$35,000, represents, we believe, the overheads included by Mr. Crowell but excluded by the company in preparing the 1912 allocation, and it also probably represents some additional depreciation which was taken into consideration by the company in setting up that allocation and which had accrued between the time of the Crowell report and December 31, 1912. When the 1912 allocation was made the company was required to put on its books the labor and material costs of the property as of December 31, 1912, and then set up a depreciation suspense

to represent the amount of accrued depreciation. It is well known by the Commission that the company was not given permission to include overheads in making this particular allocation, and we now believe that if the reproduction values had been used at that time and the proper amount had been set up for a depreciation suspense, this case would have presented far less complication. There is a substantial difference of opinion in this case between the representatives of the company and the city as respects the Elm Street steam plant and the method of allocating it as between the electric plant and the steam heating plant. The company contends that all of this plant should be charged to the electric utility because it is a peak-load station and also a steam reserve. The city's engineer, Mr. Ballard, on the other hand, insists that 80 per cent of this plant should be charged against the steam heating utility and 20 per cent to the electric, while Mr. McClellan in his report to the city stated that it should be divided equally between the two departments. We do not think that the contention of the company, or that of Mr. Ballard, is the one for us to adopt. Steam heating is now and has for many years been a substantial portion of the company's total business. Historically, the steam heating business antedates electric service so far as this plant is concerned, and we do not see how, in justice to the users of electricity, the steam can be considered solely as a byproduct although it must be admitted that commercial steam heating is nearly always considered as a byproduct and could not be sold profitably on any other basis. The city claims that the allocation should be on the theoretical apportionment of the total heat in the steam which is used by the engines for generating electricity and by the steam system for heating. Assuming that the theory of Mr. Ballard is correct in respect to the manner in which the heat units are distributed as the steam is used, it must be observed that it entirely overlooks the inherently inefficient qualities of engines and steam turbines as devices for transforming heat into work. It is prob-

ably a fact that the engines in the Elm Street plant take less than 10 per cent of the heat out of the steam and that the balance goes to the heating system, but it should be borne in mind that the engines could not utilize much more than this proportion in any event, and the balance would have to be wasted if not used for heating. In the largest and most efficient plants, using condensers and not doing any heating but designed solely for efficiency in generating electricity, the turbines (which are more efficient than engines) do not utilize much, if any, more than 20 per cent of the heat which comes to them, and the rest is a total loss which up to the present time engineering skill has not been able to overcome. All of the boilers in this plant are required for operating the engines. If the heating system should be abandoned, it would be theoretically possible to cut down the boiler plant by using condensers, but the saving which would be made in the cost of boilers would be largely offset by the cost of condensing equipment. The situation is one, therefore, where the boiler plant is used by both departments in common, but it would be required just as it is by either department standing by itself. We say this having in mind the fact that the company is in the situation where it has the property and it is employed in the public service and has been for many years. In view of that situation, which we are obliged to deal with as we find it, we are of the opinion that the plan advocated by Mr. McClellan of allocating one-half to the electric department and one-half to steam heating is fair, based strictly on the merits as we have discussed them, and that it would not be reasonable to attempt to deal with the steam as a byproduct. Certainly it is not fair to the users of electricity to load an unreasonable amount of this expense on them, but on the other hand it is not fair to the steam heating customers of the company to unduly burden them with any portion of the steam plant which should properly be carried by the electric department. The electric department is not discriminated against by making this allocation, because it

appears in the record that the Elm Street plant is easily worth to that department its entire cost for use in holding down the peak on purchased power and for use as a standby. Considering the plant from this last standpoint, there is considerable merit in the claim of the company that all of this expense should be charged to the electric department, but as heretofore stated we think that the decision we have made is the most reasonable one under all the circumstances.

The records of the Commission show conclusively, we think, that the figures used by the company in the 1912 allocation were based on labor and material costs without the usual overheads. In the 1907 case the petitions of the Economy Company and the Gas Company alleged that the value of the physical property, exclusive of materials and supplies, was \$873,107.81, and claimed a total value including intangibles of \$1,149,300. These values apparently did not take into account the question of depreciation. There were four affidavits in that proceeding to the effect that the value of the property in question was equal to the amounts set forth in the petitions. Two of these affidavits were made by engineers who stated that they were familiar with the property. Testimony to the same effect was also given on hearings held before this Commission. Mr. Crowell undoubtedly took into consideration the question of depreciation when he made his valuation, as appears from his report, and if the subject of depreciation is considered in connection with the figures of the petitioners above referred to, then the results reached are fairly comparable with those ascertained by Crowell. The 1912 allocation was ordered by the Commission in a capitalization case (No. 2548), because it was found at that time that the books of the company did not show the allocation of its property by items, and consequently it was impossible to follow the different items of property and properly account for the same. In making this allocation it was considered desirable from a bookkeeping standpoint to have the book assets in 1907 equal the face

value of the securities then issued so the company would not start out with either a surplus or deficit. On this theory it was decided that the fixed capital December 31, 1912, should be \$700,000 plus the cost of additions made since 1907, which brought the total amount of fixed capital to \$948,507.68. This of course included all of the property of the company employed in the gas, steam heating, and electric light and power departments. The allocation first prepared by the company and presented to the Commission for consideration may be summarized as follows:

Labor and material cost	\$964,642.00
Physical overheads	219,840.00
General overheads	<u>128,179.68</u>
	\$1,312,661.68
Depreciation	<u>364,154.00</u>
Net	\$948,507.68

This matter was under consideration by the Commission for nearly two years. The books of the company were exhaustively examined by representatives of the Commission and the property valuations were checked by its engineers. The division of capitalization required the company to determine the amount which should be allocated to the different fixed capital accounts without taking into consideration the question of depreciation, and the company was required to reduce its total valuation so as to accomplish this result. It could have been done by scaling down all of the values, labor and material items as well as overheads, but it was finally agreed to drop the question of overheads entirely in making the allocation (the representatives of the company, however, stoutly maintaining that it did not waive its contention that these overheads were considered reasonable and legitimate), and after several changes were made in the values placed on various items to comply with the recommendations of the engineer of the Commission the company did scale the labor and material items down to the values shown in the final allocation as filed and approved by the Commission in its order of December 10, 1913. This did not give any determination as to the total value of the property, for the figure of

62 PUBLIC SERVICE COMMISSION, SECOND DISTRICT

P.S.C. 2d D.

\$948,507.68 is made up entirely on the basis of using the limited capitalization of 1907 above referred to as a starting point, and no allowance even was made for the excess property value which existed beyond \$700,000 as shown in the Crowell report. That this assumption is correct and that these figures only purported to represent bare labor and material costs is borne out by the allocation itself and by the report of the engineer of the Commission of September 18, 1913, which states that the figures are reasonable "on the assumption that the amounts . . . represent only materials and labor," and by the evidence which has been given in this case. The 1912 allocation, however, does assist us materially in arriving at total values because it is a reliable showing of labor and material costs. The records show that the company's engineer in preparing it searched the records of the company and used the actual cost figures wherever they could be found, and made an estimate of that cost where the exact figures were not obtainable. In many instances where items were questioned by the representatives of the Commission vouchers were produced to substantiate the figures presented by the engineer of the company. No attempt was made by the Commission at that time to require the company to make an exact allocation as between the electric and steam heating departments. Its principal effort was to see that the proper costs were assigned to the various items of property. It is therefore desirable at this time to try and determine what the reproduction value is of the property employed in the electric department.

First, we will take the labor and material cost of the property as set forth in the 1912 allocation which was.....	\$397,619.00
Less amount included in land and representing three houses on the property adjacent to the Elm Street station and hereafter included in general structures.....	2,000.00

	\$395,619.00

LOCKPORT LIGHT, HEAT AND POWER Co.

63

Vol. VII.

Dividing land and buildings as heretofore
discussed makes the figures for boiler
plant:

Land	\$4,200.00
Buildings, coal trestle, and stacks.....	34,622.00
Boiler and accessories.....	49,065.00

\$87,887.00

One-half of this total is to be charged to steam heating..	<u>\$43,944.00</u>
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\$351,675.00

Add proportion of general land, general structures, and general equipment (44 per cent).....	<u>20,645.00</u>
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Labor and material cost of property properly chargeable to electric department 12/31/12.....	<u>\$372,320.00</u>
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To these items there must necessarily be added something for the other items of cost necessarily associated with the establishment and creation and development of the property. The fact that the property exists is indisputable evidence that an organization must have been effected, preliminary studies of some sort made, and the enterprise must have been managed and administered in the early stages of its development. There must have been expense for engineering, purchasing property at different times, supervision of the work, and other miscellaneous expenditures of the sort which everyone who is familiar with construction work of this character knows it is necessary to incur as a part of the work. These expenses are organization, administration, legal expenses, engineering and superintendence, general expenses, and interest during construction. There are other items claimed by the company such as piecemeal construction, contingencies, incidentals, and omissions which are to a considerable extent real and which do have an influence on the cost of the property. These are, however, things which should properly be included in the unit costs, and we think they are probably included in the 1912 allocation. In any event they are undoubtedly included in the figures covering

64 PUBLIC SERVICE COMMISSION, SECOND DISTRICT

P.S.C. 2d D.

additions since 1912 because the books of the company show what its costs have been. There is a wide difference of opinion as to the various percentages which should be used for the various items of physical property, but experience has shown that the cost of creating and putting into operation property of the character which we are considering in this case will ordinarily amount to from 15 to 25 per cent of the labor and material costs, and we think that an allowance of 20 per cent for the general and overhead items above mentioned will be a reasonable amount to apply in this case. No question is involved as to the additions since 1912 as we have stated above. If some of the overhead items since that date have not been charged to fixed capital but have gone into operating expense, the company will have received a proper credit therefor, and the same will be reflected in the final figures used in arriving at the amount upon which it should properly earn a return. There is at the present time a small item for engineering expense carried in suspense until such time as the Commission shall determine the proper disposition to make of it, but for the purposes of this case it may be included in the fixed capital additions as it will in no way affect the final determination which is to be made. We then find that the reproduction value as of December 31, 1916, is as follows:

TABULATION B

Labor and material costs 12/31/12.....	\$372,820.00
General and overhead expenses, 20%.....	74,464.00
Cost of additions 12/31/12 to 12/31/16 (including only proper proportion of general items).....	60,968.00
Engineering since 1912	8,834.00
Total cost of physical property used in electric department 12/31/16 (exclusive of working capital).....	\$511,586.00
Estimated depreciation 12/31/16.....	100,000.00

These figures include nothing for promotion expense, cost of financing, development expenses, cost of establishing the business, early losses, or going value. Some of these items are synonymous, and they are not set down with the idea of showing that a large part of the factors has been omitted but are all mentioned so that there may be no possible

misunderstanding as to what is and what is not included. As to depreciation the record is not particularly satisfactory. The city claims an amount which is about 22 per cent of its total estimated cost. In case No. 5769 we determined that for the purpose of having the books of the company represent the facts as nearly as possible there ought to be a depreciation reserve of \$74,321.53 against property which was carried on the books at a value of \$506,608.06. This amounts to less than 15 per cent, and it covered the depreciation since 1907. Very few of the overhead expenses were included, and some of those which were included in the foregoing calculation are less subject to depreciation than the labor and material items. A considerable part of the property has been installed within recent years, and some of the oldest and least useful has been retired and has not been included in the figures given. The property is generally in good condition and well maintained. We doubt if the actual depreciation exceeds 20 per cent, which would amount to approximately \$100,000 on the reproduction value above referred to.

For the purpose of ascertaining how these figures would check with those given by Mr. Crowell in his report, we have made some further computations. While that report was not itemized to any considerable extent we can make an approximate allocation of his figures to the electric department. For this purpose we have assigned 30 per cent of the figures for lands and buildings to the engine room of the Elm Street plant, and this is chargeable direct to the electric department. The remaining 70 per cent has been assigned to the boiler plant, and one-half of this amount is charged to the electric department and one-half to steam heating. His figures for steam plant cover boilers and accessories, and we have assigned 50 per cent to each department. As to the construction account of \$21,908 of the Economy Company, we have no definite information as to which department it is properly chargeable. At the time the Crowell report was made, the buildings and equipment were apparently com-

66 PUBLIC SERVICE COMMISSION, SECOND DISTRICT

P.S.C. 2d D.

pleted. This account probably covered extensions made to both steam and electric distribution systems and not included in the items covering those systems. The steam heating system of that company had been established for a long time. The electric business of the company was in its infancy, and it was being developed in active competition with the gas company, so the fact is that probably the larger portion of this account was for extensions to the electric system. However, for our present purposes, it will be fair, we believe, to charge one-half to each department. The report gives the segregation of the property of the company as between the gas and electric departments. The following then is the distribution of the figures given in the Crowell report:

TABULATION C

<i>Economy Company:</i>	<i>Total</i>	<i>Steam heating</i>	<i>Electric</i>
Land	\$15,000	\$5,250	\$9,750
Buildings	34,500	12,075	22,425
Electric plant	18,525	.....	18,525
Electric distribution system	35,910	.....	35,910
Steam plant	43,200	22,600	22,600
Steam distribution system	120,537	120,537	.....
Construction account	21,908	10,954	10,954
	\$291,580	\$171,416	\$120,164
<i>Gas and Electric Company:</i>			
Electric plant .....	.....	.....	170,790
Total (exclusive of working capital and material and supplies) .....	.....	.....	\$290,954

This was a depreciated value. It is desirable to make some estimate as to the amount of depreciation that was probably considered by Mr. Crowell in arriving at his valuations. We know that the electric plant of the Economy Company was quite new in 1907, and so there was probably only a small amount of depreciation on its electric plant except in the case of the boilers. The gas company had been in business for a good many years, and we know that much of its property had been installed prior to 1907. It may fairly be assumed that the depreciation on its property amounted to at least 25 per cent. In any event it is reasonable to assume that there was at least a depreciation of \$40,000 from the reproduction cost new of the property of both companies at the time Crowell made his report. We will therefore assume

Vol. VII.

that his figure of \$290,954 was made up of a cost new total of \$330,000 and a depreciation of \$39,046, and with this as a starting point proceed to build up the property from cost records since the time of his report. All of the extensions and additions to fixed capital made between the time of his report and January 1, 1908, appear to have been covered in the items charged in 1908. No retirements are shown separately on the books during the period 1907-1912. The retirements during that period were in connection with new facilities which were being installed, and the cost of the old was deducted from the cost of the new and the net figures put on the books. The retirements were not extensive during that period, so that the results which we obtain are not materially affected because of the fact that we are unable to consider each item of additions and retirements separately during that particular period. All of the items chargeable entirely to the electric department have been allocated on the basis which we have heretofore explained. The annual depreciation has been computed on the basis of 2.4 per cent of the cost of the property when new. Checks have been made in detail for selected years and found to be correct so far as depreciation can be correctly determined. On this basis we have made the following tabulation:

TABULATION D

	<i>Cost new at end of period per Crowell report plus net additions at voucher cost</i>	<i>Additions</i>	<i>Retirements of period</i>	<i>Deprecia- tion at 2.4% on value at beginning of period</i>	<i>Accrued depreci- ation at end of period</i>
June 30, 1907.	\$330,000	.....	.....	.....	\$39,046
Six mos. 1907.	330,000	.....	.....	3,960	43,006
Year 1908	359,888	\$29,888	.....	7,920	50,928
Year 1909	387,888	28,056	.....	8,636	59,562
Year 1910	414,211	26,322	.....	9,309	68,871
Year 1911	435,819	21,708	.....	9,941	78,812
Year 1912	449,098	18,179	.....	10,462	89,274
Year 1913	472,220	24,486	\$1,864	10,778	98,688
Year 1914	499,820	31,012	9,912	11,838	106,109
Year 1915	509,620	11,484	1,184	11,984	116,909
Year 1916	518,900	14,302	10,022	12,281	119,118
Dec. 31, 1916	518,900	.....	.....	.....	119,118

It will be observed that the results obtained in this statement check very closely with those obtained in the preceding

statement which was prepared to show the reproduction cost of the property. We are led to believe that they represent with reasonable accuracy the total cost of the property of the company employed in its electric operation as of December 31, 1916, excluding of course any allowance for material and supplies and other working capital. To go a step farther with this discussion of the value of the property we would call attention to the fact that the present value of the property as shown on the last statement, after deducting depreciation estimated to be \$119,118, would be \$394,782. If we take the amount shown as the value of the property, using Crowell's estimate and adding to his figures the additions which have been made by the company since that time, we have a total of \$474,854.52 as appears from the first tabulation marked "A". From computations made by our division of capitalization in other cases in which this company has appeared before the Commission, it is estimated that the company should have an accrued depreciation reserve of \$99,732 as of December 31, 1916, against which it would be entitled to charge retirements amounting to \$16,482; leaving an amount of \$83,250 to be deducted from the cost of the property based on the Crowell report as shown in Tabulation A in order to determine the depreciated value of the property on that basis. This gives us an amount of \$391,634 as such depreciated value. This is a further confirmation, we think, of the methods which we have used in endeavoring to determine the value of the property of the company employed in its electric department.

While it might not be necessary for us to go further in order to determine what we consider the fair value of the property upon which the company is entitled to a return yet for the purpose of further confirming the results already reached we have made one more computation of figures taking some of the exhibits of each of the parties and making certain adjustments which we think are proper in respect to the Elm Street station and land used in electric operations.





This tabulation is based on the figures set forth in the company's exhibit No. 22; and the property values set forth in city's exhibit No. 4, pages 1 and 6; and exhibit 5, page 1. (Tabulation E, folder facing this page.)

In preparing this statement we have taken the figures of the company as they appear in its exhibit, but have changed the allocation in respect to the Elm Street plant in accordance with our views which we have heretofore presented. We have, however, included all of the overheads which it claims and a reasonable amount for working capital. On this basis the reproduction cost of the company's property would be \$576,785. As against this it would of course be proper to deduct the amount of accrued depreciation, estimated by Mr. Perkins at \$120,000, and this would give the net value of the property employed in the public service at \$456,785. In respect to the figures used by the city in its exhibits, we have changed the allocation with regard to the Elm Street station in the same manner as we did with the figures of the company in this connection. We have added the various overheads which the engineer of the city has testified are proper, and also the amounts allowed for working capital, material and supplies, etc. While counsel for the city, at page 69 of his brief, says, "As the question whether overheads should be included in the valuations as above discussed is a legal or moral question as applied to the facts of this case, rather than an engineering question, the fact that Mr. Ballard has allowed a substantial item for such overheads should not militate against our contention that no allowance therefor should be made. He is an engineer, not a lawyer, and he naturally treated the subject from an engineering, not from a legal or moral standpoint. He has been more than fair and liberal with the company," yet it is proper for us to say at this time that the question of overheads is neither moral nor legal but one of fact, and they are actual and real. The city employed Mr. Ballard as its engineer, and we believe it

70 PUBLIC SERVICE COMMISSION, SECOND DISTRICT
P.S.C. 2d D.

should be bound by the evidence he gave in respect to the overheads.

We have also increased the city's figures for some of the electrical apparatus because we know the costs to the company were considerably in excess of the amount allowed by the engineer of the city. We also know that many of the other unit costs used by the city's engineer are less than the actual cost to the company. For this reason we have deemed it proper to make certain allowances on account of omissions which increase somewhat the city's figures. It is but natural that there would be many omissions of this character in attempting to determine a reproduction value in the manner employed by the engineer of the city. Many of the expenses which undoubtedly have been incurred over a long period of years during which the company has been in operation are bound to be lost sight of in making up a reproduction value where the engineer does not have the opportunity to work with the figures showing the actual cost to the corporation. The reproduction value as worked out by us on this basis is \$531,344. Mr. Husselman estimated that the depreciation on the property was \$97,908, and to this we have added an amount to cover the depreciation on such increased allowance as we have made so that the total depreciation which it is proper to deduct from the city's figure is \$109,598. This leaves the present value of the property as \$421,746. The difference between this figure and that of the company, amounting to approximately \$35,000, is made up to a large extent in the difference allowed by the two engineers for interest during construction, and the balance is probably due to differences in other overheads and in the unit costs for various items of property. It is significant, however, that the two computations can be brought so closely together, and if our method of revising the figures of both the city and the company is correct, then it will be seen that there is really not very much difference between the parties as

Vol. VII.

to the actual value of the property employed in the public service.

The company asserts that it is entitled to a substantial amount for going concern value, and in its exhibit No. 18-a it attempts to show that it is entitled to at least \$304,000 for this purpose as a minimum. It arrives at this amount by certain formulas, using figures from the books of the company, reports to the Commission, and other records of the corporation over the period from 1897 to 1917. It claims that these computations show that the actual deficiency of return upon the property employed by it in the public service during this period, without adding the deficiency each year to the capital entitled to a return for the succeeding year, amounts to \$304,782. It cites the case of *Kings County Lighting Company*, 210 N. Y. 479, and the theory adopted by the special committee of the American Society of Civil Engineers appointed to formulate principles and methods for the valuation of railroad property and other public utilities. While the argument of the company may be sound, yet we do not think it can be supported by the facts in this case. The Lockport Light, Heat and Power Company bought the property of two separate corporations as it existed on or about January 1, 1908. It acquired all of the physical property owned by those companies as of that date, including their contracts, franchises, rights, privileges, etc., free and clear of all lien and debts excepting the outstanding bonds of the Lockport Gas and Electric Light Company amounting to \$300,000, and delivered in exchange therefor a certain amount of stock and bonds. It started its business as the owner of the property of those underlying corporations, and it must be assumed that for the purchase price it acquired such intangible assets as going concern value, right to do business, development expenses, etc. In other words, the owners of the underlying properties had expended such amount as might have been necessary to acquire these intangible assets and they were included in the purchase price. The new

company did not acquire the right to tax the people in the city of Lockport for any going value or deficiency of return in those early years prior to 1907, for the owners of the properties during that period made no claim that they were entitled to anything on that account so far as the record in this case discloses. We are of the opinion that they parted with this intangible asset, for such it can be termed, when they parted with the properties for a certain specific price representing on the surface at least what they considered the assets to be worth. To hold otherwise would, we believe, be manifestly unfair to the present and future customers of the Lockport Company. As a matter of fact that corporation has never sustained any of those losses in the years in question "due to losses or expenditures which were necessary and proper in developing efficiency and economy of operation and in establishing a business," using the words of Judge Miller in the Kings County case, for the reason that it never came into existence until the year 1907, and it was not until December 21st of that year that this Commission made an order authorizing it to purchase the property of the two corporations hereinbefore referred to; so while we recognize that deficiency of return or going value, or whatever it may be termed, is something to be reckoned with and must always be given full consideration in a rate case, yet in the matter that is now before us we must and do determine that the question of going concern value must be dealt with for the years 1908-1916 inclusive only, and if we find there is such a deficiency a proper allowance should be made therefor in ascertaining the valuation upon which the company is entitled to a reasonable return. While the company attempts to show that it could fairly justify a claim of going concern value to the extent of \$304,000 as above mentioned, yet its engineer stated on the hearing that it was realized that it could not reasonably expect to earn a return on that amount because the company could not exact rates which would enable it to obtain that return, and that it was believed

that it should be allowed at least \$95,000 for going value or deficiency which represents the accumulation in that respect from the year 1897 to 1908 notwithstanding the fact that in its exhibit No. 18-a it arrives at a deficiency of \$241,466 for the period from 1908 to 1916 inclusive.

The city contends that no allowance should be made for going value because the company has had a fair return upon all of its electrical property during the years 1908 to 1916 inclusive, and its engineer attempts to justify this by certain figures which appear in city's exhibit No. 5, at page 7. These computations were made by taking the reproduction value, depreciated value, and investment value as of December 31, 1916, as determined by the city's engineer, and then working back to and including the year 1908. For this latter year it appears by this exhibit that the value of the depreciated property is only \$10,658 less than the cost of reproduction new of the same property. It is apparent that this is incorrect because some of the property in the electric department had been in service as far back as 1894 at least, and beyond that, Mr. Crowell found that the physical value of this property in 1907 was \$290,953.76 without making any allowance whatever for working capital. Beyond this, the investment value which Mr. Ballard takes as a starting point at December 31, 1916, includes \$31,713 for working capital, material and supplies, and administration, organization, and other expenses, and it must be assumed that these same figures, or a substantial part of them, are included in the investment value at the beginning of the year 1908, which is placed at \$246,525. In considering this exhibit it must also be borne in mind that only 20 per cent of the reproduction cost of the furnaces, boilers, and accessories has been allocated to the electric plant; also 20 per cent of the power plant structures occupied by the boiler room. Apparently no allowance has been made for retirements, and the return is figured on the value of the property at the beginning of each year. The amount allowed as a return upon the invest-

ment has been figured on the basis of 7 per cent. For the purpose of showing that the method employed by Mr. Ballard in making these computations was incorrect, the company, in connection with its evidence, introduced exhibit No. 27 which its witness Wheeler testified was prepared by him. He stated that he had taken the figures presented by the city's engineer and had carried the computation back to the year 1897, using the same methods as those employed by the engineer in preparing the figures which we have just been discussing, and that the result showed that the cost of reproducing the depreciated property as of June 30, 1897, was about \$4734, and the value of the depreciated property at that time was about \$15,311. We think these figures speak for themselves. Suffice it to say that even as far back as 1897 the city of Lockport was being supplied with electricity for lighting and power purposes by the Lockport Gas and Electric Light Company, its streets were lighted by electricity, and it is doubtful if this could be done at all successfully by a plant which could be reproduced new for the modest sum of \$4734.

The figures presented in the city's exhibit No. 5, at page 7, which we have been discussing, are the ones on which the city relies as establishing the fact that the company has earned a fair return on its property after providing for all its fixed charges and depreciation. A return on the investment of 7 per cent is assumed to be reasonable and sufficient. It is apparent what a very substantial change there would be in the result shown on this exhibit if the proper allocation was made of the Elm Street steam plant and the return was figured on the basis of 8 per cent of the value of the property. As regards the rate of return there are of course differences of opinion. Some will argue that 6 per cent is a fair return citing the Consolidated Gas case as an authority. On the other hand, there are decisions of this Commission, as well as that of the First District, in which a rate of 8 per cent has been found reasonable for companies doing a larger

volume of business and which are perhaps more prosperous than the Lockport Company. We know that in recent years the cost of money for companies such as the one now before us has been steadily increasing, particularly where the corporation is not earning enough to provide a proper depreciation reserve out of its earnings. During the past three years it has been possible at almost any time to invest money in far more reliable securities than those of the Lockport Company at rates which will give a return equal to and in many instances in excess of 8 per cent. Then again it is a well known fact that the securities of a corporation the size of the Lockport Company are not in demand. They have no ready market and the holders are not able to dispose of them readily in case it is desired to sell them or becomes necessary so to do. We know that at the present time it is difficult, if not impossible, for such a company to sell its securities at any price, and the fact that the company might be able to pay its stockholders a return of 8 per cent on their investment would not make any substantial demand for them. Beyond this it is not known how long the present situation is to prevail. People who are versed in financial matters believe that rates for money will be high for several years after the present unusual conditions have become a thing of the past and the world has been restored to normal conditions. We believe that those who invest their money in the service of the public in a city the size of Lockport, and assume all of the risks incidental thereto and attempt to give people the service to which they are entitled, should receive a return of 8 per cent on their investment and that the sum is reasonable and fair. The State of New York is not a pioneer in recognizing that such a return is not unreasonable, for decisions to that effect have been made throughout the country and in sections where the rates for money are as reasonable in ordinary times as they are in New York. We therefore consider that the Lockport Company is entitled

76 PUBLIC SERVICE COMMISSION, SECOND DISTRICT

P.S.C. 2d D.

to a return of 8 per cent upon the value of the property employed in its electric department in the public service.

In order to show what the result has been of the company's operations since 1907, we have prepared two sets of figures, the first one of which is as follows:

LOCKPORT LIGHT, HEAT AND POWER CO.

77

Vol. VII.

TABULATION F. STATEMENT SHOWING ANNUAL ACCUMULATED DEFICIENCY OF RETURN, JANUARY 1, 1908, TO DECEMBER 31, 1916.

Year ended Dec. 31	(a) Average fixed capital investment	(b) Working capital	(c) Total capital for computing return	(d) Gross revenue	(e) Operating expenses and taxes (depreciation excluded)	(f) Net operating revenue	(g) Return on capital at 8%	(h) Depreciation	(i) Necessary net revenue	(j) Deficiency of return	(k) Accumulated deficiency of return
1908.....	\$274,637	\$12,000	\$286,637	\$99,202	\$82,000	\$17,292	\$22,931	\$8,444	\$31,375	\$14,083	\$21,767
1909.....	303,582	14,000	317,582	89,503	89,503	27,099	25,407	9,376	34,783	7,684	\$21,764
1910.....	320,771	16,500	347,271	134,061	113,866	20,195	27,782	10,132	37,914	17,719	39,486
1911.....	354,786	17,500	372,286	144,539	114,936	29,843	29,783	10,041	40,324	10,381	50,181
1912.....	372,229	19,000	391,229	122,965	122,965	29,406	31,298	11,038	42,336	12,130	62,997
1913.....	390,380	19,000	409,380	154,678	152,467	32,104	32,750	11,558	44,308	12,204	75,201
1914.....	415,491	19,000	434,491	161,959	161,959	28,072	34,759	12,383	47,142	19,070	94,271
1915.....	434,191	20,000	454,191	128,068	128,068	33,891	36,335	12,981	49,316	15,425	109,696
1916.....	441,481	25,000	466,481	203,693	139,985	63,708	37,318	13,179	50,497	15,211	96,485

(a) Figures in this column prior to 1913 have been arrived at by reducing the investment in each year by deducting additions in each year from figures in allocation at December 31, 1912. Figures for 1913 to 1916 inclusive include 1912 allocation figures plus yearly net additions. All figures have been re-stated upon accepted bases for division between Steam and Electric departments, and to the fixed capital balance at the end of each calendar year has been added one-half of the additions in the following year for the purpose of securing the average investment per annum.

(b) Working capital has been arrived at by using \$25,000 in 1916 as a proper allowance, and by reducing such amount in 1916 for each of the other years upon a proportionate basis determined by the ratio of gross revenue in each of the other years to gross revenue for the 1916 year, the volume of business (revenue) dictating the amount of working capital required.

(c) Equals (a) plus (b).

(d) Gross revenue from electrical operations as shown by the company's annual reports filed with the Commission.

(e) These figures have been arrived at after consideration of the details supporting the company's allocation of expenses. The only exception to this is in 1908 where such details are not clear and where an estimated figure of \$82,000 is used, the company's figure being \$80,150, and Ballard's figure \$81,557.

(f) Equals (d) minus (e).

(g) Equals 8% upon (f).

(h) Figures in this column have been developed by applying the rates for depreciation which have heretofore been recommended by this division and accepted by the company in connection with capitalization proceedings to the details making up column (a).

(i) Equals (g) plus (h).

(k) Equals (j) minus (i).

The method employed in determining the deficiency of return is explained in detail. The figures representing the average capital investment make no allowance for the related overheads during construction, such as engineering and superintendence, taxes, insurance, law expenses, and miscellaneous construction expenditures which existed as a part of the cost of the property as of January 1, 1908. That there were such overhead expenses is beyond question, and the various statements which we have heretofore referred to at length support this conclusion. But even taking the bare labor and material costs with such overheads as may have been included since 1908 which we know are small in amount, and it appears that the deficiency of return on an 8 per cent basis since 1907 has been \$96,485. Some explanation should perhaps be made at this time of the method used in determining the amount of operating expenses of the company during those years. The principal difference between the company and the city during the period under consideration is due to an error in distributing the expenses of the Race Street station and the allocation of the expenses of the Elm Street boiler plant. Mr. Ballard made his allocation of expenses for the Elm Street station on the same basis that he used in allocating the physical property, namely 80 per cent to steam and 20 per cent to electric. For the reasons which we have explained at length, we do not think this is the proper division, and we have divided the expenses on the same basis as we divided the physical property. On this basis we find that the operating expenses for 1916 are as follows:

Vol. VII.

TABULATION G
1916 Expenses

	Chargeable to Electric Dept.	Basis
<i>Total</i>		
Fuel and handling.....	\$31,126	\$9,450
Boiler labor.....	2,619	795
Engine labor.....	992	992 All
Electric labor.....	972	972 All
Water.....	1,562	475 Fuel basis
Lubricants.....	426	320 75%
Production supplies.....	422	211 50%
Station expenses.....	474	237 50%
Repairs furnaces and boilers.....	2,309	1,155 50%
Boiler app.....	1,924	962 50%
Steam acc.....	4	2 50%
Recip. engines.....	18	18 All
Pr. plant bridge.....	78	51 65%
Acc. elec. equip.....	9	9 All
Superintendence.....	537	263 50%
Total Elm Street plant.....		\$15,917
Expenses Race street.....		8,921
Niagara power.....		52,307
Water power.....		11,392
Total Production expenses.....		\$93,814
Total Transmission expenses.....		323
Total Distribution expenses.....		9,380
Total Utilization expenses.....		6,731
Total Commercial expenses.....		3,201
Total Promotion expenses.....		3,737
Total General expenses.....		22,005
Less duplicate charges.....		\$133,914 1,473
Total.....		\$132,441

To the amount of \$132,441 representing the operating expenses as shown on the foregoing statement, we must of course add taxes and depreciation. We have assumed that five pounds of coal per kw.h. is a fair charge to the electric department in 1916 by reasons of the small amount of electricity generated at the Elm Street station. Mr. Perkins and Mr. Ballard both estimated it at four pounds, but the amount of coal used would have been much more than five pounds if the plant had been operated as a separate electric station. Even on the basis of five pounds per kw.h., and with the distribution for 1916 as shown in the foregoing statement, there is but little difference between the figures of the city and the company when the difference in the allocation of the expenses is taken into consideration. We have followed the same method of allocating the expenses of the Elm Street station during the years prior to 1916 except that we have

80 PUBLIC SERVICE COMMISSION, SECOND DISTRICT
P.S.C. 2d D.

taken the fuel on the basis of four pounds per kw.h. which was agreed to by both Ballard and Perkins.

Tabulation H, on page 81, was prepared in the same way as the statement marked F except that the fixed capital at the beginning of 1908 was the amount determined by Mr. Crowell in his report, and to that figure there has been added the amount expended for net additions to the property during the subsequent years as shown by the books of the corporation.

The deficiency of return determined in this manner for the period in question amounts to \$111,836, and is probably more nearly correct than the amount of \$96,485 due to the method employed in making the determination. It is interesting to note that there has been a deficiency of return in every year beginning with 1908 except in 1916, when the company had a surplus over and above a return of 8 per cent on its investment after making due allowance for its operating expenses, taxes, and depreciation. It is desirable that the company should earn something more than the bare 8 per cent return upon its investment so that it may have a surplus and be able to provide for contingencies. This all goes to improve the financial structure of the organization and help its credit. That it was able to make this showing in 1916 is probably accounted for by the additional earnings derived by the company in that year because of the revision of its rates which went into effect November 1, 1915, by the readjustment which we have made in its power bills hereinbefore referred to at length, and in part also, we presume, because of the additional volume of business transacted by the company in the year 1916. The figures in the statements F and H seem to support the contention of the company that it was entitled to have an increase in the rates which were in force in Lockport when this proceeding was first commenced.

Now let us consider the vexing question of rates which seems to be the cause of all the controversy. As we have here

LOCKPORT LIGHT, HEAT AND POWER CO.

81

Vol. VII.

1912-1916

TABULATION H. STATEMENT SHOWING ANNUAL ACCUMULATED DEFICIENCY OF RETURN JANUARY 1, 1908, TO
DECEMBER 31, 1916 (BASED ON CROWELL FIGURES JANUARY 1, 1908, PLUS BOOK ADDITIONS).

Year ended Dec. 31	(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)	(i)	(j)	(k)	(l)
	Average fixed capital investment	Working capital	Total capital for computing return	Gross revenue	Operating expenses and taxes (depreciation excluded)	Net operating revenue	Return on capital at 8%	Depreciation	Necessary net revenue	Deficiency of return	Accumulated deficiency of return	
1908.....	\$305,871	\$12,000	\$317,871	\$69,292	\$82,000	\$17,292	\$25,430	\$7,920	\$33,350	\$16,058	\$25,500	
1909.....	334,815	14,000	348,815	116,622	89,503	27,099	27,905	8,636	36,541	9,442	44,894	
1910.....	362,004	16,500	378,504	134,061	113,863	20,195	30,280	9,309	39,589	19,394	57,274	
1911.....	386,016	17,500	403,516	144,839	114,966	29,943	32,282	9,941	42,223	14,563	72,127	
1912.....	403,462	19,000	422,462	152,462	132,371	29,406	33,797	10,462	44,259	14,323	86,050	
1913.....	421,613	19,000	440,613	154,678	122,574	32,104	35,249	10,778	46,027	13,923	106,589	
1914.....	446,724	19,000	465,724	162,467	124,395	28,072	37,258	11,333	48,591	20,519	123,496	
1915.....	465,424	20,000	485,424	161,959	128,068	33,891	38,834	11,884	50,818	16,927	111,836	
1916.....	472,714	25,000	497,714	203,693	139,985	33,708	39,817	12,231	52,048	11,660	111,836	

P.S.C. 2d D.

tofore stated, the rates which have been attacked were authorized by the order of the Commission made on October 5, 1915, and they went into effect on November 1, 1915. They were agreed to by the city, the company, and the Commission. As between those and the ones now adopted by Mr. Ballard, as the engineer of the city, there are material and fundamental differences. The rates now in force were intended to be as simple and workable as possible and to follow the general trend of service costs so that each class and each individual would pay the amounts which bear some relation to the expense to which the company is subjected in serving electricity to its customers. The rates proposed by Mr. Ballard are based on general average principally and have not been prepared upon any of the bases which are now recognized as being proper and desirable in connection with the sale of electric energy. It is true that they are simple, and possibly they may be preferred by some of the consumers in Lockport, but we doubt if any substantial proportion of the customers of the company would seriously advocate such a rate if they fully understood that it resulted in many consumers paying much less than it costs the company to serve them while others paid a substantial amount above the cost. We think the fair and equitable way is for each user of electricity in small quantities to pay his fair share and no more.

The principal attack was made on the service charge for residence lighting. It was argued that the small consumer was made to pay more than a fair amount for his electricity and that there was no justification for such a charge. Because an increase is made in the amount that the small consumer has paid in the past, due to the fact that he has not been paying his fair share of the burden incident to his service, is no reason why he should get that service at the expense of the other consumers who use larger quantities of electricity. We have never seen any plausible explanation of the theory that the consumer of small quantities of electricity should be supplied at less than the cost to the company

serving him. As a matter of fact such a claim can not be successfully defended. It is argued that the service charge raises the rate of the small consumer who is least able to pay and lowers that of the larger consumer who is presumably in better financial circumstances, yet we will not presume to, nor does the law require us to, compel a company supplying electricity to furnish it to the small consumer at less than cost and at the expense of those who may be better able to pay; and yet this is the inevitable result if electricity is sold for residence lighting purposes on a flat kilowatt-hour basis.

Rate making in the early years of electrical development and at the time when the rates prevailing in Lockport were continued in force, pursuant to the stipulation made in case No. 74, was not understood as well as it is today, and the rates of the small companies for lighting and power purposes were usually based on quantity consumption without regard to the cost of the service, which was supposed to be absorbed in the charge for the electricity. As a result the rates were high and necessarily so, otherwise the companies would not have been able to earn their operating expenses and ordinary fixed charges to say nothing about a return on their investment. As time went on changes in rates were found to be necessary due to the demand of the business, the necessity for increasing the output, and in order to make the use of electricity not only desirable but profitable for both parties. So far as the sale of power for industrial purposes is concerned, it was found many years ago that there had to be something in the nature of a fixed charge paid by the consumer to represent the cost of serving him so that the company would be reimbursed for the investment which was required to enable it to supply the electricity, whether the customer used it or not. This was and is known as the demand charge; and is in use almost universally by companies selling power for industrial purposes, and it is recognized as right and proper. If we call this a service charge it is the same thing. For years there has been a demand charge

§4 PUBLIC SERVICE COMMISSION, SECOND DISTRICT

P.S.C. 2d D.

paid by power users in Lockport, and so far as we know, it has never been seriously attacked until the present case. No facts were presented by the engineer of the city as supporting his claim that the rate schedule presented by him was a proper one and better for all concerned than the one now in force. The principal justification from his standpoint was that the rate which he proposed was in his opinion a good one and would produce sufficient revenue to enable the company to earn a proper return on its investment. As against the opinion so expressed by him we find a rate in force which meets the views of practically every engineer who has studied the subject of electric rates from the time of Wright and Hopkinson down to the present day.

We could present numerous citations in support of the form of rate schedule which has been subject to so much criticism in this case. The Commission discussed at some considerable length the subject of rates for electricity in the Buffalo rate case (III P. S. C., 2 N. Y., 739-801,802), and the fundamental principles there brought out show conclusively that much more than the mere number of kilowatt hours used by any consumer must be considered if those who use electricity are to be fairly treated. Mr. Ballard presented a number of curves to show the operation of the present and his proposed rates. We are at a loss to understand why these were introduced in evidence because they present the best argument against the rates proposed by him and in favor of those now in force. While it is true that the present rates do not in all cases make a smooth curve and do not follow exactly the trend which might be desired, yet they make no such broken and unreasonable curve as do those of the Ballard rates. Mr. Ballard admitted that the cost of serving an ordinary residence customer would be at least \$1 per month, and it might be as much as \$1.50 per month, exclusive of the energy charge. He frankly stated that 50 cents per month is not enough to cover interest, depreciation, taxes, and cost of taking care of the plant, etc. These costs do not disappear as

soon as the consumer begins to use electricity; they do not change at all but remain constant; and after making the necessary investment to give the service, reading the meter, making out the customer's bill, and doing the necessary book-keeping, which is incidental to his business relations with the company, the only additional expense involved in supplying him with electricity is the cost of the electricity itself, including of course the transformer losses which are continuous during the hours when current is on the line. If it costs exactly the same to render service to two adjacent residences, except as to the electricity actually furnished, why should the cost for one become twice as much as the other as soon as one of these residences uses ten kw. hours and the other twenty kw. hours, and what is there to justify charging one twice as much as the other? Why should not the customer who wishes to use any considerable amount of electricity be able to get it substantially at cost after he has paid the fixed charges of serving him? Most of the current used in Lockport is purchased at a price of \$16 per hp. If a residence only used electricity for two hours a day, the current alone would cost the company less than 3 cents per kw.h., and if electricity is used more hours per day the cost per kw.h. would be less. If the kilowatt-hour rate was made 3 cents, the service charge would have to be \$1.15 per month in order to produce the same amount of revenue. In the original petition in this case a careful and elaborate cost analysis was submitted, showing that the "customer" cost amounts to \$22.80 per year, exclusive of "capacity" and "current" cost. There is also the testimony of Mr. Ballard in the record that the customer cost will be at least \$1 per month. From the facts which have been presented in this case, an equitable rate for residence lighting in Lockport would be a service charge of something in excess of \$1 per month, and an energy charge of something less than 3 cents per kilowatt hour. The representatives of the company, as well as those of the city, and the Commission, who were

instrumental in working out the existing rate fully recognized that the service charge ought to be more than 75 cents per month and the energy charge lower than the one which was fixed, but it was considered that it would be inadvisable to go any further than they did along lines which were new in respect to the method of selling electricity in Lockport and which would materially affect many consumers who prior to that time had not been paying a fair charge for the service rendered to them. The same observations which have been made with regard to the residence lighting might be applied to other classes of service in Lockport, and it could be easily shown that the service or demand charges should be higher and the energy charge lower. If we were inclined to recommend any revision in the present rates, we believe it should be in the opposite direction from that recommended by the engineer of the city. The present rate schedule is probably not perfect, and we presume none of them ever are, but yet we do not see that anything has been presented in this record to show that the rates proposed by the city are better than the ones now in force, nor has there been presented any good reason why they should be adopted, having in mind the correct principles which should be applied in determining proper rates for selling electricity.

We believe that Mr. McClellan, in his report to the city, well stated the case when he said —

There are three elements of cost connected with the service of electricity to a consumer.

First, the company has certain expenses of which bookkeeping, meter-reading, billing, collecting, etc., are typical for every consumer whether he takes any service or not. These are the so called consumer costs.

Second, inasmuch as the consumer has the right to take energy for lighting or power at any time he pleases, without warning, simply by closing a switch, the company must maintain lines and generating capacity; must keep voltage or pressure on the consumers' lines, and be all ready to give him service whether he closes his switch and takes service or not. This is the so called demand cost, or readiness to serve charge, and its magnitude for any given consumer depends somewhat upon its maximum demand.

Third, if the consumer takes energy for lighting or power, the company is put to further expense. In a steam plant, it must burn more coal. It must always use more oil, put in larger conductors, have greater loss, etc. The cost of the energy is more or less in direct relation to the amount of energy used.

In many cases the total rate for service is expressed by three separate and distinct rates corresponding to each of the above costs. This is called a three-charge rate. It should not be inferred that this rate is always a carefully calculated rate from accurately allocated expenses. First of all, it is difficult to make a satisfactory allocation of the total expense of service into these three divisions. Second, even if it were possible to obtain accuracy, various commercial conditions, especially if the company has a history of rate making, prevent a strict adherence to the calculated quantities.

Frequently the expression of the rate is "simplified" by combining in a variety of ways these three rates to form two rates. The rate itself is not necessarily changed a particle, merely its expression. The expression is changed merely because commercially it may be more attractive to the consumer. As a matter of fact, the simplification is only apparent because the simplest rate is the three-charge rate. The latter undoubtedly looks more complex. Frequently, for certain classes of service, a further "simplification" is introduced by various forms of block energy rates. In this case the demand and customer charge do not specifically appear, but are introduced by making the first block of energy cost more than succeeding blocks.

It is important to note that all these different expressions do not necessarily change the rate itself.

The Inducing Feature: The object of every business man having any investment on which he must earn a return is to make use of that investment to the greatest extent possible. It is only by doing this that the greatest profit can come to the merchant and the greatest benefit to his customers. In other words, greatest profit and lowest rates. Any rate, therefore, which does not induce the greatest use of the power house capacity is not economically correct and should be adjusted. A proper rate will always induce a customer to keep his maximum demand as low as possible, and to make use of his demand the greatest number of hours possible.

We think it might be well to mention at this time that when the company first made its application for permission to increase its rates there were many of its customers who paid nothing whatever in some months for the service which the company was rendering. Some were residence customers

and some were power customers. A list was given showing the earnings during the month of April, 1912, from thirty customers having 5-hp. motors installed. The lowest amount paid by any of these customers was 76 cents, and the maximum \$9.15. A similar list of 113 general lighting customers was submitted for the month of April, 1912, showing that a large number of them used no electricity at all, and the minimum bill rendered to any of them was 8 cents and the maximum was 74 cents. Another list was submitted of 143 residence customers, some of whom used no electricity, and the minimum bill rendered to any of these customers was 8 cents and the maximum was 68 cents. A statement was also submitted showing the connected load and the amount of the bills for 41 power customers for the same month, the installed capacity of the motors ranging from $\frac{1}{2}$ -hp. to 105-hp., and some of these customers used no electricity during the month, while the minimum bill rendered to any of them was 77 cents and the maximum bill was \$12.60; and the charge for electricity to the customer having the 105-hp. installation amounted to only \$12. We think these illustrations speak for themselves and conclusively demonstrate the inequality of the rates which prevailed in Lockport prior to the revision which was approved by the Commission.

Before we leave this discussion of rates it may be of some interest to call attention to one of the tabulations which was used by Mr. Ballard to show the injustice of the present rates. The figures are shown on pages 13 to 18 inclusive of the city's exhibit No. 5. The purpose of this statement was to show the average rate paid by a customer for the electricity purchased by him for the months of July and December, and also to point out the great difference in such average rate as applied to the users of different quantities of electricity. According to these computations the customer who used 6 kw.h. in July and 10 kw.h. in December paid an average rate for the two months of 14.4 cents per kw.h.; while the

customer who used 22 kw.h. in July and 45 kw.h. in December, for example, paid an average rate per kw.h. of 6.8 cents. This is certainly an ingenious way of pointing out that a discrimination is caused by the present method of charging for electricity used by residence consumers, but it is not the proper way to analyze the present rates for the service, because he ignores the service charge completely, and the only criterion he used was the charge per kilowatt hour. In other words, he attempts to show that the service charge of 75 cents per month is really a charge for the electricity supplied, when such is not the fact, and is quite contrary to the principle upon which the present rates were established and authorized by the Commission. Standing by itself the figures presented by Mr. Ballard might readily seem to indicate a discrimination between the residence lighting customers of the Lockport Company to a person who was not familiar with all of the facts in this case, and we do not consider that they should be passed by without pointing out the other facts which should be considered in connection with them. In order to present the matter clearly and in accordance with the facts, these computations should show that the customer who uses 6 kw.h. in July pays a service charge of 75 cents and 5 cents per kw.h. for his electricity, and when he uses 10 kw.h. in December he pays the same service charge and the same rate per kw.h., and not an average rate of 14.4 cents per kw.h. as Mr. Ballard attempts to demonstrate. In other words, what he pays for his electricity as such is the same no matter whether he uses 1 kw.h. per month or any other amount not exceeding 35 kw.h. per month, and after that the rate for his electricity is very substantially reduced.

A good deal appears in the record in regard to the prices at which power is sold by the company in large quantities. We do not think this requires much consideration or discussion. It is a well known fact that in order to stimulate the use of electricity in large quantities the price must be low in order to compete with other methods of producing

energy. We do not find that the company is selling electricity to large power users at an unreasonably low price. It is probably necessary for it to do this in order to conduct its business to the best advantage. Besides this, we believe that there are other conditions which have been imposed upon the company in times past which seem to require it to sell power at these low prices, and it has probably been for the best interest of the people in Lockport that this has been done as it has probably been a factor in developing the city industrially. We believe it is sufficient for us to say at this time that if at some future day it should satisfactorily appear that the company should and could increase the price now charged by it for power in large quantities it ought to and probably will take the necessary steps to increase that price. Whether this would be of any material benefit to the small consumer in Lockport we can not at this time attempt to determine.

During the progress of the case it appeared that the company did not treat all of its power consumers in the same way, particularly those whose rates were based upon a demand charge. The demand of some of these customers is determined by demand meters which are manufactured for that purpose. Other customers have not had such demand meters installed in their premises, but the representatives of the company have determined the demand by what they call the stop-watch method. The witnesses for the company stated that the amount used by some of these power consumers was not sufficient to justify it in going to the expense of installing demand meters and that it had also had great difficulty in getting such meters although they had been ordered for a long period of time. While the stop-watch method may be all right as a means of determining what the customer's demand is, yet we believe that if the company establishes a rate for power based on the demand, that it ought to treat all the users of power in that class alike. It is not the fault of the consumer if the company deems it best to establish such a rate, but he is entitled to the same treatment as all other

power users in his class. He is undoubtedly justified in claiming that there is an apparent discrimination against him if a demand meter is installed in his premises for the purpose of determining his demand, but no such meter is installed in the premises of his neighbor whose demand is determined by the stop-watch method. The company should therefore arrange to install demand meters in the premises of the power users whose rates are based on a demand charge so that all such customers may be treated alike so far as the determination of the demand is concerned. While it may be true that the amount of current used by some of these customers does not justify the installation of a meter, yet this is an element of cost which must be considered in making rates and will be given every consideration in due course.

For the purpose of ascertaining the proper amount upon which the company should be entitled to earn a return, we have prepared a summary of the various tabulations which have been discussed in this opinion, the table of tabulations on page 92.

This enables us to see what the fixed capital was at December 31, 1916, after allowing for depreciation, and what the total amounts would be including working capital, and deficiency of return at the sum claimed by the company, namely \$95,000; also what the totals would be if there was allowed for deficiency of return the amounts shown in F and H, which are \$96,485 and \$111,836 respectively. In considering this phase of the case we have concluded that the book figures in Tabulations A and F do not correctly represent the actual investment of the company as we have before shown, and that they properly ought not to be used as a basis for ascertaining upon what amount the company should be allowed to earn a return. We think the company's figures shown in Tabulation E should be eliminated from the present consideration, as we think they are too high in some respects as we have pointed out. We think that the proper totals to be used, so far as invested capital is concerned, are those

§2 Public Service Commission, Second District

IV^{IV}
P.S.C. 2d D.

	(A) (Books) Dollars	(B) Dollars	(C)	(D)	(E)	(F)	(G)
	(Crownell) Dollars		(Company) Dollars	Dollars	(Books) Dollars	Dollars	(Crownell) Dollars
December 31, 1916							
Fixed capital.....	474,854	511,886	476,785	486,785	411,891	472,714	
Depreciation (after allowing for withdrawals).....	429,554 83,260	511,886 100,900	513,900 119,118	*570,785 120,000	*561,908 100,908	383,260	76,112
Working capital.....	381,904	386,814	411,886	384,782	456,785	431,746	388,231
	25,900	25,900	26,880	25,000	25,000	25,000	25,000
Total invested capital.....	416,804	381,304	436,686	419,782	456,785	421,746	383,231
Deficiency of return at.....	95,000	95,000	95,000	95,000	95,000	95,000	95,000
Total amount on which company is entitled to a return.....	511,904	476,304	531,886	514,782	551,785	518,746	478,231
or							
with deficiency of return placed at \$86,485.....	513,089	477,789	533,871	516,267	553,270	518,281	479,716
or							
with deficiency of return placed at \$111,886.....	528,440	493,140	548,422	531,618	568,621	533,582	495,067

* Includes working capital.

representing the Crowell figures in Tabulation A, and those in B and D, the city's figures in E, and those in H based on the Crowell valuations. Disregarding entirely for the moment the amount to be allowed for deficiency of return, we see that the minimum amount in any of these last mentioned calculations is \$416,604 and the highest is \$436,586. The difference between them is slightly less than \$20,000. It might not be unreasonable to take either one of these amounts, but in order to be perfectly fair to all concerned we have considered that it would be proper to take the average of the total amounts in the five tabulations under consideration for the purpose of ascertaining what the total invested capital was as of December 31, 1916, after allowing for depreciation. We find that this amounts to \$423,264. It then remains for us to determine what amount should be allowed for deficiency of return. From the standpoint of the city's counsel and engineer no allowance should be made on this account. The company claimed, as we have stated, that it was entitled to an allowance of \$95,000 for this purpose in ascertaining what rates it might properly be permitted to charge. From the calculations made by our division of capitalization, based on the book figures of the company, we have seen that the actual deficiency of return on an 8 per cent basis as of December 31, 1916, is \$96,485, and on the basis of the Crowell figures it is \$111,836 as of the same date. In Tabulation F it appears that the surplus of the company for the year 1916, after allowing for depreciation and an 8 per cent return on the invested capital, was \$13,211, and on the basis of Tabulation H the surplus for the same period was \$11,660. This is without giving any consideration to the question of a return upon the deficiency which has accumulated during the years 1908 to 1916 inclusive. Inasmuch as the company now appears to be earning something more than 8 per cent on its investment it seems to us that we are justified in concluding that it is not entitled to earn a return upon a deficiency in excess of \$95,000 notwithstanding the

94 PUBLIC SERVICE COMMISSION, SECOND DISTRICT

P.S.C. 2d D.

accumulated deficiency is apparently somewhat larger. Upon this basis the company is entitled to a return upon its total invested capital plus a deficiency of return of \$95,000, or a total amount \$518,264. The results which will follow on the basis of the earnings of the company for the year 1916 are as follows:

Fixed capital after allowing for depreciation.....	\$398,264
Working capital.....	<u>25,000</u>
Total capital for computing return.....	\$423,264
Deficiency of return.....	<u>95,000</u>
Total amount on which to base return.....	\$518,264
Gross revenue 1916.....	\$203,693
Operating expenses, including taxes (depreciation excluded).....	139,985
Net operating revenue.....	\$63,708
Return on capital and deficiency at 8%.....	\$41,461
Depreciation.....	<u>12,231</u>
Necessary net revenue.....	<u>53,692</u>
Surplus.....	\$10,016

It may, and probably will, be claimed that the company ought not to be permitted to earn anything more than the return on this amount, and that it is not entitled to have anything left for a surplus after paying 8 per cent on \$518,264, but we have in mind that portion of the law relating to these matters which states that a corporation should be allowed not only to earn a reasonable average return upon the capital actually expended, but also something for surplus and contingencies. This is undoubtedly sound. If when a company has paid to its stockholders the amount which represents the return on their investment there is nothing left over, then there would be no accumulation in the treasury to enable the corporation to make extensions and additions to its property without increasing its capital or to provide for any unusual expense to which it might be subjected in the conduct of its business and which might perhaps not be a proper subject for capitalization. That there are such contingencies is well known to everyone who is at all familiar with public utilities like the Lockport Company. Then again there is the serious question of obsolescence, which we

have not brought into the consideration of this case, and it is something which must always be borne in mind. While it is true that it may not be of so much moment at the present time, due to the great improvements which have been made in recent years in the electrical industry, yet such improvements are going on from year to year, and the companies must be able to take advantage of those improvements if they are to keep abreast of the times and to give such service as the public requires and is entitled to expect if a fair and reasonable price is paid for that service. While the depreciation account takes care of some portion of obsolescence, yet depreciation, as we have figured it in the present case, does not take care of unusual items of obsolescence. We believe that it is better for the public to permit a company to earn a small surplus so that it may not be handicapped in keeping fully abreast of the times, and so that the public can successfully assert its claim that such improvements as are necessary and desirable should be promptly made and not permit the company to be placed in a position where it can plead that it is too poor to comply with such demands. If a condition of prosperity prevails with a corporation, there will be no necessity or justification for it to urge that it ought not to be required to make extensions and improvements which the public desires and is entitled to because such extensions and improvements will not earn a fair return on the investment. Extensions could be made upon which the return to the company might be nothing for a considerable period of time if considered entirely by themselves, but the fact that the total business of the company is prosperous even though some of the extensions asked for might be unprofitable, would warrant making them and would also justify a regulating body in ordering them to be made. In this way many people would have an opportunity to get service who might otherwise be deprived of it if the company was able to demonstrate that it would be unable to earn anything on the additional investment required to

give the desired service. The expectation is that when a corporation obtains a franchise from the public to enable it to give service in a community that it shall, so far as possible, give the entire community that service, provided it can be done and still give the company a fair return on its investment.

So we say that the Lockport Company and the public which it serves is better off in every respect if it is able to earn an amount which will enable it to have a surplus available for some of the purposes we have indicated, and if the company continues to prosper the time may come when it will have succeeded in earning out the deficiency which has been accumulating in the past years; and if that time does come and the company has been able to give all of the service which may reasonably be required from it, then a situation will be presented where a reduction in its rates may very properly be required.

We can not speculate, however, as to the future, for none of us knows what it may bring forth. As a matter of fact, we have not given any consideration to the operating expenses of the company for the year 1917 which we presume have increased considerably over 1916, the same as those of other companies engaged in business under substantially similar conditions as the Lockport Company, and it might be that the earnings of the corporation for 1917 will not show any substantial amount over and above an 8 per cent return on the capital invested plus the deficiency of return. It is also quite probable that the operating expenses for 1918 will be equal to if not higher than those for 1917, and this condition is likely to prevail until the world gets back to what we frequently term the normal conditions which prevailed prior to 1915.

Then again, if business conditions become depressed for any considerable period of time, the surplus which the company is able to build up may be of material assistance in enabling it to maintain the rate of return to its stockholders,

inasmuch as it seems to be a well established fact that property employed in the public service is entitled to a reasonable rate of return in bad times as well as when prosperity prevails. This is particularly true in recent years since corporations have been subject to regulation and their rates have been fixed with respect to the earnings which the company should be permitted to receive, and every effort is being made to see that rates to the public are fair and that the corporation shall, so far as possible, have only a fair return for the service which it renders the public. Then again, of course, under regulation the companies are not permitted to earn exorbitant profits in the prosperous years which would aid them in providing for their necessities during the lean years.

In any event, the facts which have been developed in this case do not seem to justify a determination that the present rate schedule of the Lockport Company is either unfair, unreasonable, or inequitable, at least so far as the residence lighting customers and small power users are concerned, and we believe, and so determine, that there is no reason, so far as the record in this case discloses, why the rate schedule which was fixed by the order of the Commission on October 5, 1915, should be modified in any respect at this time, and the application of the Electric Consumers Protective Association, the Lockport Board of Commerce, and the City of Lockport for a revision of the existing rates of the Lockport Company should be denied; and an order to that effect entered in due course.

All concur except Emmet, Commissioner, absent; and Barhite, Commissioner, who votes in favor of the opinion except so far as it refers to the Thompson Investigating Committee or the action taken by that Committee, as he does not consider it proper in a proceeding of this kind to consider that question or the action of that Committee.

98 PUBLIC SERVICE COMMISSION, SECOND DISTRICT
P.S.C. 2d D.

In the Matter of the Petition (complaint) of ADDISON GAS AND POWER COMPANY under sections 71 and 72, Public Service Commissions Law, asking that said company may be allowed to increase its rate for natural gas. [Case No. 6281.]

1. The Addison Gas and Power Company applied to the Commission for approval of an amendment of its franchise in the village of Addison, in form authorizing an increase in its rates for natural gas.

Held, That the rate fixed by franchise, if it had any effect, did not supersede the rate regulating powers of the Commission (*People ex rel. N. Y. & N. S. T. Co. v. Pub. Serv. Comm.*, 175 App. Div. 869; *People ex rel. Village of Walton v. Pub. Serv. Comm.*, decided by App. Div. 3rd Dept. Jan. 18, 1918, not yet reported), and that the petition should be treated as one under sections 71 and 72 for an order fixing the price of gas, as it contained all the necessary averments of such a petition.

2. The petitioner obtained its gas by purchase from a Pennsylvania producing corporation with which it had an arrangement by which the Pennsylvania corporation received, in payment for gas furnished two-thirds of the price charged by the petitioner to its consumers. The Pennsylvania corporation sought to compel an increase in rates to consumers in order to obtain a higher price under this arrangement.

Held, That the Commission could not recognize the right of the two corporations by such an arrangement to regulate prices to consumers, but as it could not compel the Pennsylvania corporation to continue to supply the gas, the question was presented what, if any, relief the petitioner should have in order to enable it to pay the increased price demanded by the producing company.

3. Upon an examination of the operations of the company it was held, That it was entitled to increase its price from 40 cents net to 48 cents net, it being calculated that this would yield, under present conditions, a return of about 8.6 per cent on the value of the property used in the public service, and that this return is, under the circumstances, reasonable.

Decided February 28, 1918.

Appearances:

Delmar M. Darrin, Addison, N. Y., and *Michael H. Danaher*, Elmira, N. Y., for petitioner.

C. L. Crane, Addison, N. Y., for the Village of Addison.

E. C. Smith, Addison, N. Y., for himself as a consumer and taxpayer, in opposition.

IRVINE, Commissioner:

This application is in form for the approval of an amendment of a franchise granted by the Village of Addison to the applicant. The only amendment to the franchise is permission to raise the rate for natural gas from forty-five cents a thousand feet, with five cents discount for payment on or before the 18th of the month, to fifty-five cents with a similar discount. Under the decision in *People ex rel. N. Y. & N. S. T. Co. v. Pub. Serv. Comm.*, 175 App. Div. 869, the Commission must hold that the village was without authority to regulate by franchise the price to be charged consumers; or at the most, that any authority it has in the premises is subject to the rate regulating powers of this Commission. Therefore the application was treated as one under sections 71 and 72 of the Public Service Commissions Law as its averments contained everything necessary in such an application.

The plant of the applicant, the Addison Gas and Power Company, was constructed during the years 1903 and 1904. It apparently has continuously purchased its gas from the Potter Gas Company, a Pennsylvania corporation, whose field of production is in the State of Pennsylvania, and which has a transmission line along the northern part of that State and reaches Addison, Corning, and Elmira by diverging short lines of pipe. The reason stated for the proposed increase is that the Potter Gas Company has increased its price of gas to the Addison Company. It appears clearly enough, although the evidence is in a con-

100 Public Service Commission, Second District

P.S.C. 2d D.

fusing form, that the price paid by the Addison Company to the Potter Company per thousand feet is two-thirds of the price received per thousand feet by the Addison Company from its consumers, so that, in effect, the Potter Company, which is now demanding that the Addison Company make the increase, is asking that it receive thirty-three and three-tenths cents per thousand feet instead of twenty-six and seven-tenths cents. There is an apparent discrepancy on this two-thirds and one-third basis between the amounts received by the Addison Company from its consumers and the amount paid to the Potter Company. This is because the Potter Company receives payment for all gas supplied by it, and the Addison Company must therefore sustain all loss occasioned by leakage and similar causes.

The Commission can not, of course, recognize the power of the two gas companies to fix the rates charged to consumers by the Addison Company by means of a contract for payment to the Potter Company of a percentage of the rate charged in Addison. Assuming that the Commission might regulate the rate to be charged by the Potter Company to the Addison Company, it is quite clear that it could not compel the Potter Company, a Pennsylvania corporation, producing in Pennsylvania, to continue to supply gas at wholesale to the local company. There seems to be no other practicable supply of natural gas for Addison, and it is better for the people of Addison to pay more for their gas than to have no gas. This is the alternative presented by the Potter Company. It therefore devolves upon the Commission to ascertain what, if any, relief the Addison Company is entitled to under the circumstances.

The opponents of the application and the company agreed that the actual investment by the Addison Company in its plant is approximately \$20,000. The experts of the Commission deem this a fair appraisement. This sum, however,

Vol. VII.

represents little more than the bare bones of the property. Something must be added for organization, administration, engineering, and interest during construction. The plant is small and the period of construction must have been very short. Without any evidence as to these costs it does not seem proper to allow more than 10 per cent therefor. There is no evidence upon which to base a finding as to development costs. In 1906 there was a deficit in income of \$1765.70, but there appears an item of miscellaneous expense in that year of \$4954.50, which is many times higher than the similar item for any subsequent year, and \$4850 thereof is attributed to expense for damages awarded with no evidence as to their nature. Since then the plant has consistently paid interest on its bonds and dividends on its stock. The bonds, paying 6 per cent, amount to \$15,000, and are held by members of two families and chiefly by one man in each family. The stock amounts to \$50,000 par value. From the foregoing statements it will be seen that there is behind the stock only about \$5000 of cost of physical property and not much of other value. The rate of dividends for the past few years has been about 3 per cent on \$50,000. To summarize the operations of the company without going into elaborate details, we fix the cost of the plant and its value as follows:

Labor and material cost	\$20,000.00
General and overhead items.....	2,000.00
Materials and supplies, etc.....	500.00
Total cost of physical property.....	\$22,500.00

In 1916 the income account, summarized, appears as follows:

Operating revenue	\$14,699.20
Paid for gas	\$10,513.00
Salaries, taxes, etc.	1,899.60
Depreciation (estimated)	660.00
	13,072.60
Income	\$1,626.60

equals 7.2 per cent on cost (\$22,500) of physical property.

102 PUBLIC SERVICE COMMISSION, SECOND DISTRICT

P.S.C. 2d D.

Assuming that the petition is granted in its entirety, the following would be the statement of estimated revenue:

Operating revenue	\$18,374.00
Paid for gas	\$13,141.00
Salaries, taxes, etc.	1,899.60
Depreciation.	660.00
	<hr/>
Income	15,700.60
	<hr/>
Income	\$2,673.40

equals 11.8 per cent on cost of physical property.

Assuming that rates remain the same, this would be the statement:

Operating revenue	\$14,599.20
Paid for gas	\$13,141.00
Salaries, taxes, etc.	1,899.60
Depreciation.	660.00
	<hr/>
Deficit.	15,700.60
	<hr/>
Deficit.	\$1,101.40

Assuming that forty-eight cents a thousand feet be fixed as the price, the following would be the result:

Operating revenue at 48c.....	\$17,639.04
Deductions as in last table	15,700.60
	<hr/>
Income.	\$1,938.44

equals 8.6 per cent on physical property.

These calculations have been made from the reports of the company for 1916. At the time of the hearing there was some evidence as to the operations of the company in 1917, but it was not complete. It was, however, sufficient to show that there had been no material change. To permit the entire increase asked would unduly enhance the profits of the company. To deny any relief would produce a deficit. To allow exactly the increase required to meet the increase in the cost of the gas purchased would give a rate of forty-six and seven-tenths cents, too awkward for practical purposes. If forty-eight cents be allowed and consumption remains the same, there would apparently be yielded a return equal to 8.6 per cent on the value of the property. This is not inordinate in itself, and permits a small margin to cover any possible undervaluation of the property. The item of \$660 per annum for a depreciation reserve is

Vol. VII.

necessary for the protection of the rights of the public by properly protecting the property of the company. It must be actually set up and carried as a real reserve for the purpose indicated.

All concur.

104 PUBLIC SERVICE COMMISSION, SECOND DISTRICT

P.S.C. 2d D.

In the Matter of the Petition of THE NEW YORK CENTRAL RAILROAD COMPANY under section 54 of the Railroad Law for consent to the discontinuance of the Pulvers station on the Hudson and Chatham branch of the Boston and Albany Railroad, lessor. [Case No. 6309.]

Decided March 12, 1918.

BARHITE, *Commissioner:*

This is an application by The New York Central Railroad Company for consent to the discontinuance of Pulvers station on the Hudson and Chatham branch of the Boston and Albany Railroad, lessor. An agent is now kept at this station. At the hearing the attorney for the railroad stated that the company desires to make the station so far as passengers are concerned a flag stop, and to discontinue the delivery and reception of freight in less than carload lots, the billing to be handled at Mellenville, a station 2.17 miles away, or at Ghent, 3.69 miles away. The company desires to do away with the services of the agent. Four passenger trains and one freight train pass Pulvers station each way on week days. Two passenger trains each day make regular stops; the others are flag stops. The number of single-trip tickets sold to Pulvers as a destination during the year 1917 was 1635; and in addition, 29 twenty-five ride tickets were sold. There were during the same time 1927 tickets sold out of Pulvers, in addition to 13 forty-six ride pupil tickets. The total revenue, passenger and freight, as estimated by the railroad company, was \$2600; as given by the petitioners, \$2687.34. The cost of running the station was in wages of agent \$691.60, in addition to repairs, the cost not given; and I presume the amount paid for coal.

Sixty-eight carloads of freight were shipped from the station during the year 1917. The amount of less than carload freight was not large. The amount of freight shipped to the

station was not given. It would seem that Pulvers is of sufficient importance to require the services of an agent to care for the safety and convenience of passengers; to keep the station heated when necessary; in winter time to keep the walks to and from the station in passable condition; to receive orders for freight cars; to protect their contents while in process of loading; to ship and receive freight in whatever quantities it may be offered; to attend to the billing of the freight; and to perform such other duties as are usually performed by an agent at small stations in the country.

The station is a source of profit to the railroad company, and the amount of the income over and above the expense of maintenance, including the salary of an agent, constitutes a very substantial sum considering the location of the station.

All concur.

106 PUBLIC SERVICE COMMISSION, SECOND DISTRICT

P.S.C. 2d D.

In the Matter of the joint petition of THE PENNSYLVANIA RAILROAD COMPANY and THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY under subdivision 2, section 54, Public Service Commissions Law, for consent to acquire jointly or severally capital stock of the Frontier Electric Railway Company. [Case No. 5834.]

The opposition of competing railroads will not be allowed to overbalance a public demand for better freight facilities.

Decided March 19, 1918.

Appearances:

Messrs. Cohn, Chormann & Franchot (by Mr. Cohn), Niagara Falls, N. Y., for the Frontier Electric Railway Company.

L. L. Babcock, Esq., Buffalo, N. Y., for The Delaware, Lackawanna and Western Railroad Company.

J. G. Rodgers, Esq., Superintendent, Buffalo, N. Y., for The Pennsylvania Railroad Company.

E. G. Connette, Esq., Buffalo, N. Y., appearing in behalf of Bertron, Griscom & Company.

H. A. Taylor, Esq., 50 Church street, New York city, and *Messrs. Moot, Sprague, Brownell & Marcy* (by S. F. Carr), Erie County Bank Building, Buffalo, N. Y., for Erie Railroad Company, in opposition.

BARHITE, Commissioner:

This is an application by The Pennsylvania Railroad Company and The Delaware, Lackawanna and Western Railroad Company for authority to purchase all of the issued capital stock of the Frontier Electric Railway Company. The amount of capital stock of this company issued and outstanding is 250 shares of the par value of \$100 each. All of this stock is owned by one individual, who is also the owner of the right of way to be used by said company. The petitioners

give notice that with the stock they intend to purchase the right of way, both for the sum of \$475,000.

The Frontier Electric Railway Company was incorporated in August, 1906, under the provisions of the Railroad Law, for the purpose of operating by electric power a railroad of standard gauge to extend from the city of Buffalo to the city of Niagara Falls, a distance of about twenty-five miles. On November 14, 1906, the Board of Railroad Commissioners certified that public convenience and a necessity required the construction of the railcad. That certificate is still in full force and effect. The times within which the company was required to begin and to complete the construction of its road have been extended several times by statute, and by the force of such statutes have not yet expired. The company is today alive and has the requisite legal capacity to carry out the purposes of its incorporation. Financially, the company has never yet been able to fulfill the object of its existence.

The petitioners are among the leading railroad corporations of the country, owning and controlling thousands of miles of tracks which extend from tidewater to various sections of the country, among other points to Buffalo, New York, where the lines of each company end. These two companies are of undoubted financial strength, and their ability to purchase the stock and the right of way, to build the road, and to equip it are not in question in this case.

The avowed object of the two roads is to make for themselves an outlet to Niagara Falls and to the other cities and villages along the Niagara Frontier, with the possibility of a connection with Canadian roads. The facilities offered by the development of the Frontier right of way would readily lend themselves to these objects.

Physical connection could be made with the tracks of the petitioners at Buffalo, and from thence the right of way leads through the cities of Tonawanda and North Tonawanda and the village of LaSalle to a point in Niagara Falls where the rails may be joined with the rails of the Niagara Junction

Railroad, a belt line which reaches possibly 90 per cent of the manufacturing industries of that thriving city. The complete plotted right of way ends at Portage Road in Niagara Falls, but the plan contemplates the purchase by the petitioners of a right of way from that point to Michigan avenue, in the northerly business center of the city, for the purpose of building a freight station at a point suitable for the purpose and convenient for shippers. The proposed right of way will also bring the road within easy reaching distance of the bridges across the Niagara river. The petitioners have a contract of purchase with the owner of the projected route between Portage Road and Michigan avenue with the exception of a few pieces of land.

The important question — the only one which will be considered in this memorandum — is whether the public interests demand that these two railroads shall be permitted to purchase control of the Frontier Electric Railway Company and thus in effect extend their own lines to the city of Niagara Falls. Do the New York Central and the Erie railroads, which now serve the territory, furnish adequate facilities properly to care for the business which may be offered? This question takes precedence over all others. Competing lines of railroads ask that the certificate of public convenience and a necessity granted to the Frontier Electric Railway Company by the Railroad Commissioners in 1906 shall be annulled and set aside. This request, even if this Commission has the power to take such action, will be answered when we determine the demands and the necessities of the public.

In the first place, what are the requirements of the Niagara Frontier; what are its prospects for the future? At the southern end of the proposed railroad is the city of Buffalo, the second city in size in the State, with nearly a half of a million inhabitants. Its industries, its resources, and its needs are enormous. A large manufacturing center, it is the terminus of numerous trunk lines which lead from the West and the Atlantic coast. Lying at the foot of the Great Lakes

and near one of the great gateways between the United States and Canada, the tonnage which reaches or leaves its borders strains to the utmost and at times overwhelms the resources of the transportation companies.

At the northern terminus lies the city of Niagara Falls, which has grown in twenty-five years from a quiet town of five thousand people to a hurrying, bustling, and energetic city of nearly fifty thousand citizens. Then, it was sufficient for their needs to lure from the pockets of the happy bridegroom, the foreign nobleman or statesman, the world-wide traveler or those from nearer homes who came to view the roaring cataract or the tumbling rapids, the dollars which supplied the wants of the people. Now, American enterprise and ingenuity have borne their fruits: the waters of Niagara have been harnessed, and where formerly they excited awe, wonder, and gave pleasure to thousands, they now add millions to the wealth of the world.

In 1892, when the city was incorporated, the assessed valuation was about eight million dollars; twenty-two years later it was nearly thirty-seven million dollars. Quite recently, twenty-five manufacturing concerns reported to the Industrial Commission an aggregate yearly product of over thirty million dollars. The estimated investment in power development and manufacturing establishments is over seventy-five million dollars. Niagara Falls is situated at or near two railway bridges which cross the river to Canada. The passenger and freight traffic is enormous. Over one million freight cars are handled in the joint freight yards each year. Over one million passengers arrive from foreign territory annually. The number of freight cars inspected and sealed in the same time for transportation through Canada is two hundred and fifty thousand. The immense volume of manufactured goods calls for abundant transportation facilities to bring in the raw materials and to take away the finished product.

Between Buffalo and Niagara Falls and on the line of the

proposed railroad lie the two adjoining cities of Tonawanda and North Tonawanda, important shipping and business points. Great quantities of lumber are shipped through the Great Lakes to this point and there manufactured or shipped in the rough by rail to various points in the United States.

The village of LaSalle will also be a station on the projected railway.

What is the testimony of the interested communities? Without exception they ask this Commission to permit the Delaware, Lackawanna and Western and the Pennsylvania railroad companies to purchase the stock of the Frontier Electric Railway Company and thus provide a new freight line along the Niagara river.

The Board of Trustees of the City of Niagara Falls, by resolution, ask that the prayer of the petitioners be granted. They say, "The only respect in which the city has not grown during the last quarter century is in its transportation facilities, the single track railroad of the Erie Railroad Company and the double track railroad of The New York Central Railroad Company, between Buffalo and Niagara Falls, constituting the sole means of transporting freight in and out of said city. It is obvious that the present facilities are insufficient." And again: "Additional facilities being unquestionably needed, it is the judgment of the Board of Trade that such facilities, furnished by The Pennsylvania Railroad Company and The Delaware, Lackawanna and Western Railroad Company would be more advantageous to the city and more in the line of progress than additional facilities furnished by either the Erie Railroad Company or The New York Central Railroad Company, both of which are limited as above set forth." The limitations referred to in the foregoing quotation relate not to methods of management but to lack of capacity to care for the business presented.

The transportation committee of the Buffalo Chamber of Commerce adopted a resolution which was submitted to the board of directors of the chamber and adopted by that body.

PENNA. R. R. Co. AND D., L. & W. R. R. Co. 111
Vol. VII.

This resolution among other things states that the chamber is heartily in favor of the utilization by the Pennsylvania and the Lackawanna railroad companies of the right of way to be used by the Frontier Electric Railway, and that increased railroad facilities are needed between Buffalo and Niagara Falls.

The members of the Common Council of the City of North Tonawanda signify their approval of the application of the Delaware, Lackawanna and Western and the Pennsylvania railroad companies to acquire the capital stock of the Frontier Electric Railway Company, and say they believe the best interests of their city will be thereby subserved.

The members of the Common Council of the City of Tonawanda are also in favor of the application.

The Board of Trustees of the Village of LaSalle urges this Commission to grant its consent to the acquisition of the stock of the Frontier Electric Railway Company by The Pennsylvania Railroad Company and The Delaware, Lackawanna and Western Railroad Company.

In a petition signed by over forty business firms of the Tonawandas, it is stated that the bulk of the coal and coke used at that point comes to Buffalo over the Delaware, Lackawanna and Western railroad and the Pennsylvania railroad, and the necessity of transfer delays the shipments from two to three days; that the freight moving to and from the Tonawandas averages two hundred thousand cars per year, and that this amount will increase because of the deepening of the channel of the Niagara river and the fact that the Tonawandas are the western terminus of the Barge Canal; that shippers have been hampered by lack of freight facilities in the past.

A dealer in shingles handles over eight hundred cars per year. He calls attention to the bad freight service because of the inability of the two roads which reach Tonawanda to handle the business. These two roads further cause delay in getting goods to their destination because of their refusal

to transfer to other roads at the nearest junction: they insist upon making the longest possible haul over their own roads.

A gentleman who has been in business at Tonawanda for over twenty years states that at no time have the railroad facilities been adequate at that point except when business conditions have been at low ebb.

Another business man at times hauls his goods to Buffalo for shipment because of the serious delays in transferring goods from the roads which reach Tonawanda to other roads.

A lumber dealer refers to the fact that Tonawanda is the largest white pine market in the country, and that the shipping facilities at that point have been bad for nine years.

Another shipper calls attention to the fact that cars are often held a week or ten days at Buffalo or other junction points so great is the congestion.

A firm which requires about two thousand five hundred empty cars during the year, complains that its mill has been shut down at times on account of the difficulty of getting cars, and further states that when they order cars from the Delaware, Lackawanna and Western and the Pennsylvania railroad companies, and the cars are delivered by those roads to connecting lines, quite often the cars do not reach them. Direct connections of the roads named would save not only delay but switching charges.

Another company states that the volume of freight from the Tonawandas has steadily increased during the last ten years, and that during that time the railroads have not furnished the requisite facilities.

A business house at the Tonawandas, which now handles eighteen hundred cars per year and is making plans to increase its needs by at least 50 per cent, asks for relief.

The general superintendent of The Pennsylvania Railroad Company testified that about three years ago there were approximately two hundred and twenty-eight thousand cars of freight in the territory under discussion; that his road sent in fourteen thousand cars and took out six hundred cars:

and that with an average haul of three hundred miles on the Pennsylvania railroad, that road was compelled to pay the other roads about one-fourth of the total amount received to haul the cars drawn for the last twelve or fifteen or seventeen miles of their route. Another disadvantage of the present arrangement is, as stated by the superintendent, that for a long time past it has taken from three to five days to take freight from any point in this territory before it is turned over to the Pennsylvania railroad. Now with a road of its own extending to Niagara Falls, from two to five days would be saved on every shipment intended for the Pennsylvania.

In view of the unanimous demand of the business interests which operate in the localities to be reached by the proposed road, but one answer can be logically given to the request of the petitioners. Of course every person who may have an interest in the subject matter of this discussion did not appear before the Commission. This would have been impossible. But when scores of business men and public officers appear, and all plead for one thing, their views may safely be taken as the sentiment of the community.

There is no opposition except that of the Erie Railroad Company and The New York Central Railroad Company, which alone have tracks between Buffalo and Niagara Falls. I have no desire nor is there any reason to criticize the action of these companies for opposing this application. They are well within their business and their legal rights. But their apparent motives, their conclusions, and the arguments which they advance, are in fairness to them and their opponents subject to discussion and review.

The opposition of these roads is mainly made manifest in case No. 5915, a proceeding brought by the Erie Railroad Company to procure the revocation of the certificate of public convenience and a necessity previously granted to the Frontier Electric Railway Company. To this proceeding The New York Central Railroad Company was upon its own application made a party. Each road had its day in court.

114 PUBLIC SERVICE COMMISSION, SECOND DISTRICT
P.S.C. 2d D.

It appears from the evidence that the Erie Railroad Company is the owner of a single track road and The New York Central Railroad Company of a double track road between Buffalo and Niagara Falls. Their facilities may be broader at certain points, but the above statement is true as to the number of main tracks. The New York Central Railroad Company has only one track through a portion of the business district of North Tonawanda.

The main effort of the Erie Railroad Company was made to show, not that additional freight facilities are not needed on the Niagara Frontier, but that the situation could be met by allowing The Delaware, Lackawanna and Western Railroad Company and The Pennsylvania Railroad Company to use the tracks of the Erie Railroad Company from Buffalo to Niagara Falls; and it was stated that such use would be given and that an additional track could be laid on the Erie Railroad Company's right of way if the traffic demanded. The statement was made that equal facilities with the Erie Railroad Company would be given to the tenant roads. No proposed contract was submitted to the Commission. No consideration was named, and no details which are so necessary in contracts of such importance were given or suggested.

In answer to a question from the Commissioner who heard the case, one of the general officers of the road stated that the open door is now a *possibility*. A quotation from the testimony of the same witness will show the position in which the matter of joint use of the facilities of the Erie Railroad Company remains:

Q. Do you propose after the Lackawanna and the Pennsylvania went upon your right of way and built an extra track — it is a single track, is it not?

A. Yes.

Q. That you would have rights to use that track?

A. I think that would have to be a matter of negotiation. That detail has not been worked out yet.

Q. None of the details have been worked out, have they?

A. No.

Q. None of the terms of facilities have been specified as the result of negotiations between the parties?

A. Not yet.

It does appear that previous negotiations between the railroads had been had, and that in those negotiations the Erie Railroad Company desired to prevent the tenant lines from doing any local business and demanded what was claimed to be exorbitant switching charges.

It further appears that a number of years ago the Buffalo, Thousand Island and Portland Railroad Company, which owned an incomplete right of way between Buffalo and Niagara Falls, showed signs of activity and there were indications that it intended to build its road. Immediately the Erie Railroad Company purchased strips of land across the proposed right of way of the Buffalo, Thousand Island and Portland Railroad Company and laid tracks thereon. No use, however, has been made of these tracks, as the threatening road soon ceased its activities and was no longer dangerous to competing interests.

The above incidents are mentioned as illustration of what has occurred in the past when there has been any attempt to increase the railroad facilities between Buffalo and Niagara Falls, and is evidence of the position in which the public will be placed if compelled to wait the result of negotiations between conflicting interests. As stated before in this memorandum, no criticism is intended of the action of the railroad in taking steps to ward off competition, but it is evident that such steps were and are not in harmony with the requirements of the shippers.

The amount of traffic with the Canadian roads is shown incidentally by one of the witnesses for the Erie Railroad Company, who states that in the neighborhood of fifty thousand cars per month go over the International Bridge, and that twenty thousand of this amount are interchanged with The Delaware, Lackawanna and Western Railroad Company and The Pennsylvania Railroad Company. As the Inter-

national Bridge carries only one track for part of its length, it is quite easy to understand why the petitioners are desirous of and are entitled to reach the two double tracked bridges at Suspension Bridge.

Much evidence was offered in support of the contention that if the Frontier Electric Railway should be built to Niagara Falls it would be impossible to build switches to the plants of those customers who might desire its services. Comparatively few of the shippers in any town or over any railroad have the use or desire the use of private sidetracks.

The Niagara Falls division of the Erie Railroad was built in the early seventies — a single track road — forty-four or forty-five years ago. Notwithstanding the enormous development of the business interests of the Niagara Frontier, the facilities of the road have not been materially increased since that time.

To say that the Erie could now allow the Delaware, Lackawanna and Western and the Pennsylvania railroad companies to use its tracks from Buffalo to Niagara Falls, and that each of the three roads would have abundant facilities for its business, would be to say that a house built forty-five years ago for the use of one family is now capable of conveniently caring for three families.

Each railroad must keep its trains out of the way of the trains of the other roads — the same freight houses, the same stations, and the same switches must be used. At Buffalo it would be necessary to switch to the tracks of the Erie Railroad Company, and the delay in switching is one of the grievances of which the shippers complain. As a practical matter, no contract could be drawn, no order made, which could be so enforced as to give the tenant roads equal facilities with the owner.

If a new track is to be laid, that, as the Erie officials say, must be left to future negotiations.

The New York Central Railroad Company asked to be made a party to the proceeding to revoke the certificate of

public convenience and a necessity granted to the Frontier Electric Railway Company. The New York Central Railroad Company does not propose to lend its tracks to the use of the Delaware, Lackawanna and Western and the Pennsylvania railroad companies, but endeavored to show that the present railroads in the territory are sufficient for its requirements.

With reference to the service furnished by The New York Central Railroad Company, one of the officials of the road testified as to the manner in which freight was handled by his road and the length of time which was taken in the delivery of cars to the consignee after their receipt from The Pennsylvania Railroad Company. Without examining his testimony at this time in detail, it may be said that his evidence was correctly summarized by one of the Commissioners, who remarked, "He qualified all of the statements with reference to their service by saying that they did it as fast as they could under the existing conditions". This same witness, when asked to furnish a statement showing the period that elapsed between the receipt of each of the cars mentioned by him and the time that it was placed for unloading, declined to furnish the information unless the Commission asked for it. The same witness testified that it would take from twenty-four to forty-eight hours to deliver freight from the point of origin at Niagara Falls or other intermediate points to the Pennsylvania Railroad at East Buffalo. This gentleman, when asked if the freight yard of The New York Central Railroad Company at Black Rock was not congested at all times, would not admit that congestion existed "at all times". He further admitted that there was congestion at East Buffalo, and lots of trouble at Black Rock, due to many things; that they were trying to remedy it, and thought they had, but that it remains to be seen whether they had. This witness further admitted that his road liked to get the long haul when it could. He further stated that he had no idea of the amount of business which either The

Pennsylvania Railroad Company or The Delaware, Lackawanna and Western Railroad Company had with Canada; and the next minute was willing to testify that The New York Central Railroad Company was able to take care of that business.

If it be said that the conditions with regard to the New York Central Railroad service are the result of inefficiency and improper management on the part of the officials of that road, the answer is that there is no evidence of any inefficiency in the management but plenty of evidence to the effect that The New York Central Railroad Company has not the facilities to care for the rapidly increasing traffic of the Niagara Frontier; and it is plainly apparent that no increase of tracks on either the Erie Railroad Company or The New York Central Railroad Company right of way will give the people the service that could be had by the advent of two additional trunk lines.

Finally, it may be said that the record shows that the entire shipping interests of the Niagara Frontier demand that this application should be granted; that the present railroad facilities are not and have not for a long time been sufficient to care for the business between Buffalo and Niagara Falls; that the opposition of the Erie Railroad Company and The New York Central Railroad Company is based solely upon the desire to shut out competition; that there is no evidence that conditions will be improved if left to the will of these opposing roads. Their evidence as to what they will do is delightfully uncertain and indefinite. If they can prevent the entrance of competition they well know there is no power in this Commission or in any other body to compel them to allow the use of their own tracks and terminal facilities except upon such conditions as they themselves may name.

The application of The Pennsylvania Railroad Company and The Delaware, Lackawanna and Western Railroad Company to acquire the stock of the Frontier Electric Railway

Company should be granted, so that the important work contemplated by these two roads may be made available to the public as soon as possible; and an order to that effect should be entered.

All concur.

LEVINE, *Commissioner*, concurring:

I concur in the opinion of Commissioner Barbite in this case and in the group of orders accompanying it. I do so because of the needs of the communities on the Niagara Frontier for additional transportation facilities; and I write this memorandum merely to express my regret that delay has occurred, and that a system of highway crossings, to my mind unsatisfactory, has been compelled, by reason of the failure of the promoters of the project to place frankly before the Commission at the inception of the proceedings their entire plan of construction and operation.

120 PUBLIC SERVICE COMMISSION, SECOND DISTRICT

P.S.C. 2d D.

In the Matter of the Complaint of M. D. CURTISS against
ELMIRA WATER, LIGHT AND RAILROAD COMPANY as to
charge for service pipe for gas. [Case No. 6234.]

Section 62 of the Transportation Corporations Law contemplates some apportionment between the corporation and the consumer of the expense of installing gas service, but does not provide any method of apportionment.

Held, 1. That under ordinary circumstances the corporation should pay the expense of installation from main to curb, including the expense of curb-box, and the consumer the expense from curb to meter.

2. A city ordinance enacted for the protection of city pavements and requiring in some circumstances the installation of gas service pipes at the expense of abutting property owners, from main to curb, in advance of contemplated pavement of the street, is not a warrant for departing from the ordinary practice in other cases.

3. The fact that a municipality owning its own water works requires water consumers to pay for the installation of service from main to meter does not justify a gas corporation in exacting a similar requirement.

Decided March 26, 1918.

Appearances:

M. D. Curtiss, Elmira, N. Y., complainant, in person.

Stanchfield, Lovell, Falck & Sayles (by Mr. Lovell),
Elmira, N. Y., for respondent.

IRVINE, Commissioner:

This complaint is in the form of a letter to the effect that the complainant had been compelled to pay for the installation of gas service from his cellar wall to the main on the opposite side of the street. He complained that this practice on the part of the respondent is unjust. The case was submitted on an agreed statement of facts and briefs. Under the existing law and judicial decisions, so far, the Commission is without power to award reparation, so the inquiry must be, not with reference to the particular case presented

by the complainant, but as to the reasonableness of the tariff regulation of the respondent whereby such charge was exacted.

Section 62 of the Transportation Corporations Law, after providing for the furnishing of gas and electric service, concludes: "Provided that no such corporation shall be required to lay service pipes . . . unless the complainant, if required, shall deposit in advance with the corporation a sum of money sufficient to pay the cost of his portion of the pipe or wire required to be laid and the expense of laying such portion." While this clearly indicates that some portion is to be deemed that of the customer it does not specify what that portion shall be. The Commission has in several cases determined that a reasonable apportionment is for the company to pay the expense from main to curb, including the expense of curb-box, and for the customer to pay the expense from curb to meter. *Simpson et al. v. Buffalo Gas Company*, II P. S. C., 2 N. Y., 531; *Eyring v. North Buffalo Natural Gas Company*, Case No. 4620; *Draney et al. v. Central Hudson Gas and Electric Company*, V P. S. C., 2 N. Y., 334. This is not a strained construction of the statute. To the curb at least the service belongs to the company and it is within the entire control of the company. Within the lot line it belongs to the consumer and in case of discontinuance of use the company would have no right to invade the customer's premises to remove the pipe. The actual practice is far from uniform, but nowhere in this State except in Elmira, so far as the Commission can discover, is the practice less liberal toward the consumer than that heretofore sustained by the Commission.

Two things may be stated to differentiate the Elmira practice from that elsewhere. One is that certain ordinances of the city relating to the pavement of streets permit, under certain circumstances, service connections to be required in advance of paving at the expense of the owner of abutting property. These ordinances have for their object the pro-

tection against unnecessary opening of pavements by compelling the installation of gas service not at present required but which may be required in the future. They have no relation to cases such as that presented by the complainant of new installations on streets not paved (or whose pavement is not in immediate contemplation), or on streets already paved. What the city may properly require in the exercise of its own police power for the protection of its own streets is a question not before us.

The other point is that the municipally owned water works requires consumers to pay the entire cost from main to meter. There is no analogy between the practice of a municipally owned water plant and a privately owned gas plant. A plant under municipal ownership may and often does, and even without serious protest from the consumer, exact things which could not be exacted and should not be exacted by a privately owned utility.

The statute as clearly implies that the corporation shall bear some part of the expense as it implies that the consumer shall bear some portion. The Commission, therefore, determines that the regulation of the respondent in so far as it requires the consumer to pay the cost of installing gas service from main to curb and the cost of installing the curb-box is unreasonable.

All concur.

**In the Matter of the Complaint of BUFFALO FOUNDRY AND
MACHINE COMPANY *against* THE NEW YORK CENTRAL
AND HUDSON RIVER RAILROAD COMPANY. [Case No.
168.]**

Decided May 10, 1918.

BARRHITE, Commissioner:

On the 27th day of October, 1908, after a thorough investigation, this Commission made an order in the above entitled case, which provides that The New York Central and Hudson River Railroad Company may make a maximum charge of twenty-five cents for weighing a car, loaded or empty, for the accommodation of a shipper or consignee, in cases where the weight is taken upon the scales of such shipper or consignee and no movement is involved other than stopping the car and properly placing it upon the scales and then starting it after the weighing is complete. So far as the record of the evidence discloses this order has stood unchallenged by the shippers and has been obeyed by the railroad company for nearly ten years.

The New York Central Railroad Company, as successor in interest to The New York Central and Hudson River Railroad Company, now asks that the order of October 27, 1908, be revoked.

It has not been the custom of the railroad company under its rules to charge for weighing a car upon a customer's scales under certain conditions.

Joint Circular No. 35, Rule 16f, provides —

Outbound cars may be weighed loaded (also empty before being loaded if specially requested) without charge, on the track scales of shipper, when the weight so ascertained is to be used by the N. Y. C. & H. R. R. or West Shore R. R. for billing purposes.

Inbound cars may be weighed loaded (also empty after being unloaded if specially requested) without charge, on the track scales of consignee, provided weight has not been previously ascertained, and

124 PUBLIC SERVICE COMMISSION, SECOND DISTRICT

P.S.C. 2d D.

weight shown by scales of consignee is used by N. Y. C. & H. R. R. R. or West Shore R. R. in the collection of freight charges.

Rule 16g of the same document is in the following words:

When weighing of inbound cars develops that billed weight is excessive to the extent of more than one thousand pounds, no charge will be made for the weighing at consignee's or owner's request. Corrections should not be made on waybills, however, until, by correspondence with the agent at billing point, it is found that such corrections will be accepted. If the destination weight is disputed, the case should be referred to the Auditor of Freight Accounts.

It is apparent that no burden is placed on the shipper or the consignee unless the weighing is for his own purpose or he receives some benefit.

A careful study of the evidence received at the time the original order was made, and the fact that the order has been in force and unquestioned for many years, make unnecessary a recital of the reasons for the order.

But the railroad now asks that the charge be increased to fifty cents, upon the ground that the advance in price of materials and labor make the request not only proper but necessary. In 1908, figures presented to the Commission indicate that the cost of the outfit used by the railroad was approximately \$3.50 per hour, or thirty-five cents for six minutes, a fair estimate of the time used in weighing the car. The company now claims an hourly cost of \$11.42, or \$1.142 for a six-minute period. I do not think that this latter claim can be substantiated by the facts. A witness, sworn for the railroad, testified that the figures presented included "Rental of engine, which is computed on the cost of the locomotive, interest on the cost, at \$7 an hour. An engine of that type is worth around \$30,000." But the interest on \$30,000 for an hour is a fraction over twenty cents. Neither should the entire salary of the yardmaster be charged to the expense of weighing. A fair estimate of what we may call the bone dry cost of weighing the car is a trifle over forty cents. This amount does not include the necessary clerical work in reporting the weight, in entering

BUFFALO F. & M. CO. v. N. Y. C. & H. R. R. R. CO. 125
Vol. VII.

it upon the books of the company, in transmitting the record to the general office of the company, etc. Neither does it include any rental for the use of the engine over and above the actual interest upon the value. The amount asked by the company seems to be reasonable, and should be allowed; and the order made by this Commission in the above entitled matter should be amended so as to allow the railroad company the sum of fifty cents for a service for which it is now entitled to receive twenty-five cents.

Chairman Hill and Commissioner Fennell concur; Commissioners Irvine and Cheney not present.

126 PUBLIC SERVICE COMMISSION, SECOND DISTRICT

P.S.C. 2d D.

In the Matter of the Application (complaint) of MUNICIPAL GAS COMPANY OF THE CITY OF ALBANY for an order authorizing increase of rates for gas in said city. [Case No. 6431.]

Chapter 227 of the laws of 1907, so far as it provides that "a corporation . . . engaged in the business of manufacturing, furnishing or selling illuminating gas in the city of Albany shall not charge or receive for gas manufactured, furnished or sold in said city a sum in excess of one dollar per one thousand cubic feet," is constitutional.

It was the intention of the Legislature, by the provisions of section 72 of the Public Service Commissions Law, to withhold from the Commission power to permit the Municipal Gas Company of the City of Albany to charge or receive for illuminating gas sold by it in said city, a price in excess of the maximum fixed by said chapter 227 of the laws of 1907.

The provision of said section 72 of the Public Service Commissions Law, which limits the power of the Commission in fixing a maximum price for gas or electricity to a price "not exceeding that fixed by statute," is constitutional.

Decided May 14, 1918.

Appearances:

Neile F. Towner, 126 State street, Albany, N. Y., for the applicant.

Arthur L. Andrews, Corporation Counsel, for the City of Albany.

HILL, Chairman:

The complainant is a domestic corporation engaged in the business of manufacturing and furnishing both gas and electricity for light, heat, or power in the city of Albany, and makes this complaint pursuant to the provisions of sections 71 and 72 of the Public Service Commissions Law and asks for an order authorizing it to increase the rates charged by it in said city. The prices now charged are one dollar per thousand cubic feet for the first ten thousand cubic feet

consumed in each month by the customer, ranging to lower prices for the additional consumption; and it requests authority to increase this range of prices to a schedule which will fix one dollar and thirty cents per thousand cubic feet for the first ten thousand cubic feet in each month, one dollar and seventeen cents per thousand for the next ten thousand, one dollar and four cents per thousand for the next thirty thousand, and ninety-one cents per thousand for the excess. The request is based upon allegations that the rates now charged by the petitioner are such that during the year ended December 31, 1917, the net earnings of the petitioner in the manufacture and sale of gas were less than 4 per cent upon the value of its property used in the manufacture and sale of gas; and that for the first three months of the current calendar year the receipts were \$151,351.18, while operating expenses and taxes amounted to \$170,924.05, leaving a deficit from gas operations of \$19,572.87. Assuming this showing to represent correctly the operations of the company, it would probably be the duty of the Commission, if it had the power, to grant a substantial increase in rates.

The City of Albany appeared on the hearing of the petition, however, and objected to the jurisdiction of the Commission on the ground among others "that the Commission has no jurisdiction or power under sections 71 and 72 of the Public Service Commissions Law or otherwise to make an order that the maximum price of gas in the city of Albany shall exceed one dollar per thousand cubic feet, that being the maximum price of gas fixed in the city of Albany by chapter 227 of the laws of 1907, now in full force and effect".

The statute referred to limits the price to be charged for gas in the city of Albany to one dollar per thousand cubic feet, and the prices stated in the proposed new schedule of the applicant company admittedly exceed the price thus limited.

Sections 71 and 72 of the Public Service Commissions

128 Public Service Commission, Second District

P.S.C. 2d D.

Law provide for the making of complaints against rates charged for gas or electricity by corporations which are subject to the jurisdiction of the Commission, and that such a complaint may be made by the corporation itself; and that after a hearing and investigation the Commission "within lawful limits may by order fix the maximum price of gas or electricity not exceeding that fixed by statute to be charged by such corporation or person for the service to be furnished".

We think it can hardly admit of doubt that the provision quoted prohibits and was intended to prohibit the Commission from authorizing a price in excess of that fixed in the special legislative act referred to: in fact, this conclusion would seem inevitable when we consider that the words "not exceeding that fixed by statute" in section 72 were inserted by amendment only in 1910, three years after the enactment of the special statute, at which time there was also on the statute books chapter 125 of the laws of 1906 prescribing maximum rates in the city of New York, and several other statutes of like tenor relating to other localities. The Legislature is presumed to have known of the existing laws, and it would seem clear that the amendment of 1910 was adopted with express reference to them. Obviously it was the legislative intent to impose an arbitrary limit upon the power of the Commission to increase prices beyond certain rates which had already been prescribed by itself in certain localities.

This conclusion has also been reached by the Commission in the First District in the matter of Bronx Gas and Electric Company, decided April 18, 1918; and also by former Justice Hughes, as referee, in an elaborate and well considered opinion in the case of Brooklyn Borough Gas Company *v.* Public Service Commission. In that case the learned referee said: "It will be noted that these words, 'not exceeding that fixed by statute,' were not in the Public Service Commissions Law originally. They were inserted by the amendment of 1910. In other words, at the same time when the

Legislature amended the Public Service Commissions Law with respect to railroads in the case cited [referring to the U. & D. case, 171 A. D. 607], and also amended that law with respect to gas and electric light companies, it inserted in section 72 these words 'not exceeding that fixed by statute'. It seems to me that these words are very clear and that they can not be disregarded."

A survey of the Public Service Commissions Law and of the effect in practice of its provisions discloses clearly that the Legislature, in the making and subsequent alteration of this law, fell far short of furnishing a complete and symmetrical scheme for the control of public service corporations in the important respect, that while in terms it clothes the Commissions with all the nominal power necessary to secure reasonable and safe service, it leaves them subject to certain arbitrary limitations with regard to their power over rates. It would seem plain that a public utility can not legally be required to render service for less than cost. But the Court of Appeals, in matter of *Quinby v. Public Service Commission, Second District*, 223 N. Y. 244, holds that with respect to common carriers the Legislature did not intend to confer upon the Commissions the power to increase street railroad rates over the rates which may have been fixed by the local authorities; and as already pointed out, the legislative intent to limit their power over gas and electric rates within limits fixed by the Legislature itself is unmistakable.

It is argued, however, with much force that the imperfection in the scheme of commission control over rates and service of public utilities to which I have called attention is apparent only and can be overcome by statutory construction. It is claimed that a scheme of statute law which clothes the Commission with full power over service without correlative power to grant rates sufficient to enable the utility to perform such service, is in the result a taking of private property without just compensation, and that there-

fore the statutes which supply the limitation upon the power to make a sufficient rate are unconstitutional.

While it may be that the Legislature has thus unwittingly, by force of statutory construction, clothed its Commissions with powers which at least with regard to gas and electric light companies it clearly intended to reserve to itself, we agree with the Commission in the First District, especially in view of the recent decision of the Court of Appeals in the *Quinby* case, that unless the unconstitutionality of the statute is clear it seems preferable that as an administrative tribunal exercising only *quasi-judicial* powers, the Commission shall in the first instance give effect to the obvious letter of the statute. And although for the reasons stated the constitutionality of the act of 1907 which fixes a maximum rate, as well as of the provision in section 72 which restricts the Commission to a rate "not exceeding that fixed by statute," may be considered doubtful, we are not prepared to pronounce them unconstitutional on the perfunctory presentation of the question which has been made.

A disposition of the complaint in accord with the views above expressed finds favor in certain practical considerations which confront the complainant. According to the allegations in the complaint, the present exigencies of the company, which are claimed to be serious, are brought about by the sudden disturbance of business conditions caused by the war. In such situations time is of the essence of any relief which it is found proper to grant, and the method of procedure may prove to be vital. By having the question of jurisdiction passed on by the courts in the first instance, it is believed that any relief to which the complainant may eventually show itself entitled will be afforded at a much earlier date than if it and the City of Albany were required to first present the facts by means of a prolonged and expensive examination.

The complaint is therefore dismissed, on the ground that the Commission is without jurisdiction by reason of the

provisions of section 72 of the Public Service Commissions Law, and of chapter 227 of the laws of 1907; and an order will be entered accordingly.

Irvine and Cheney, Commissioners, concur.

BARHITE, *Commissioner*, dissenting:

I regret that I can not agree with the majority of the Commission, to dismiss the complaint in this case upon the ground that the Commission is prohibited by statute from increasing the rate for gas supplied by the Municipal Gas Company to the City of Albany to more than \$1 per thousand cubic feet. It is true that section 72, article 4 of the Public Service Commissions Law provides that after hearing and investigation "the Commission within lawful limits may by order fix the maximum price of gas or electricity not exceeding that fixed by statute to be charged by such corporation or person for the service to be furnished". The permission or authority given by the Legislature to the Commission to fix the rate not exceeding that fixed by statute must necessarily refer to a valid statute, one which is constitutional and can be enforced. The same section further provides that the Commission may institute an investigation to enable it to ascertain the facts requisite to the exercise of any power conferred upon it. In other words, section 72 gives the Commission full power to fix the maximum price for gas up to the limit fixed by any lawful statute; and further than that, gives it power to make an investigation to determine the facts requisite to ascertain whether the statute [chapter 227, laws of 1907] lawfully limits the amount which may be charged for gas in that locality. That statute "limits the price to \$1 per thousand cubic feet". If this price is confiscatory, then the Supreme Court of the United States has held repeatedly that such a statute is unconstitutional and can not be enforced; and by the term confiscatory is meant a rate for service which after paying the expenses of business will not give a fair return upon the

amount of property invested. If such a return is not had, the property of the company is taken without due process of law. *Smyth v. Ames*, 169 U. S. 466; *Chicago, Milwaukee and St. Paul Ry. v. Minnesota*, 134 U. S. 418; *Minnesota Rate Cases*, 230 U. S. 352, at page 433.

The Court of Appeals has held in a street railway case, *Paige v. Schenectady Ry. Co.*, 178 N. Y. 102, at page 115, that the right to construct and operate a street railway is a franchise which must have its source in the sovereign power, and that the company itself can not make a contract which prevents it from performing its functions, and that such a contract is void as against public policy. A gas company is as much a creature of sovereign power as is a street railway company: they are both public corporations whose first duty is to render proper service to the public. The Legislature can not take away from them the right to a sufficient income necessary to enable them to perform their full duty to the public, as was held in the cases cited from the Supreme Court and in others to the same effect, and under the principle laid down by the Court of Appeals they can not even *make* a contract which will prevent them from receiving sufficient compensation to enable them to perform their proper functions. The question whether \$1 per thousand cubic feet is a sufficient price to enable the Municipal Gas Company of the City of Albany to perform its full duty to the public is one of fact which must be determined by an investigation; and if such investigation shows that the price of \$1 per thousand cubic feet is sufficient to give the company proper return, then the statute of 1907 is constitutional, and the Public Service Commission can not raise the price above the amount named in that statute. If, however, an investigation shows that \$1 per thousand cubic feet is not sufficient to give the company the return to which it is entitled, then the statute of 1907 is unconstitutional, and is of no binding effect upon the Commission or any other body or person. As noted above, the Public Service Commissions

Law gives the Commission the right to make an investigation to enable it to ascertain the facts requisite to the exercise of any power conferred upon it; and in view of such authority, this Commission has the right to investigate the facts under the complaint filed with it and determine what shall be done in the matter. The Commission certainly has jurisdictional power over this proceeding.

FENNELL, *Commissioner*, dissenting:

I can not agree with the majority of the Commission in its view that the Commission is without jurisdiction to fix a rate exceeding that fixed by statute.

The power that gives life to a public service corporation may place restrictions upon its actions. The State gives valuable rights and powers to such a corporation, and in return demands that it furnish the public the service for which it was created. The corporation must carry on its activities and perform its statutory functions. The very reason for its being is the public necessity for the performance of such functions.

For the public services performed the corporation is entitled to a fair rate of return. A maximum rate may be fixed by statute. When, however, an era of high prices creates a condition where the corporation must pay more for the service it gives the public than it gets in return from the public in rates, a condition arises that takes from the owners of the corporation their property, and gives that property, to the extent of the extra cost of service, to the public without return.

A statute that fixes a maximum rate, when taken in connection with statutes that compel continuity of service regardless of cost, creates a method, when costs exceed returns, whereby the property of bondholders and stockholders is transferred automatically to the customers of the corporation. The result of compelling service and refusing

134 PUBLIC SERVICE COMMISSION, SECOND DISTRICT
P.S.C. 2d D.

a fair return is a taking of private property without just compensation, and is unconstitutional.

The statute fixing a maximum rate is therefore unconstitutional when the fixed maximum does not equal the cost of service plus a fair return.

This question of sufficiency of rates to meet expenses is a question of fact, and can be decided only after a careful investigation and examination of the books, reports, records, etc., of such a corporation, and the taking of such testimony as is necessary to develop all the facts. The Public Service Commission has been given authority in section 72 of article 4 of the Public Service Commissions Law to hold an investigation "to enable it to ascertain the facts requisite to the exercise of any power conferred upon it".

Only an investigation by a body duly authorized by law can develop whether or not a maximum rate is confiscatory. As this Commission is the body authorized to conduct investigations as to costs of public service, it would seem that the hearing and investigation should proceed, and we should determine from the facts brought before us what the actual costs of the public service were and are. If the costs are shown to exceed the statutory maximum rate, then the statutory maximum, for the reasons above set forth, should be disregarded and a proper rate fixed, such rate to continue until cost conditions warrant a reduction.

Vol. VII.

Petition and Amendatory Petition of OGDENSBURG STREET RAILWAY COMPANY, under subdivision 1, section 49, Public Service Commissions Law, for permission to increase passenger fares. [Case No. 6092.]

On an application for permission to increase rates of fare by a street railroad corporation beyond the five cent rate permitted by section 181 of the Railroad Law, it was

Held, after an investigation, that such increase was necessary to enable the applicant to earn a fair return on the value of its property used in the public service, and the Commission fixed a new schedule of rates as shown in the order accompanying this Opinion.

Decided May 21, 1918.

Appearances:

Neile F. Towner, Albany, N. Y., for petitioner.

Andrew D. Morgan, State Hospital Commissioner, Albany, N. Y., for the State Hospital Commission.

IRVINE, Commissioner:

The Ogdensburg Street Railway Company asks permission to increase rates of fare beyond the five cent rate permitted by section 181 of the Railroad Law. The power of the Commission to make the investigation and its duty to grant such increases, when it is found that the statutory rate does not permit a fair return on the value of the property used in the service, is recognized in the matter of the application of Quinby, recently decided by the Court of Appeals but not yet reported. The city has imposed no restriction by franchise or otherwise.

The case is so clear on the facts that no minute investigation is necessary. The following is a table showing the results of operations for five years:

	1913	1914	1915	1916	1917
Operating revenues.....	\$36,615	\$36,756	\$38,408	\$35,789	\$37,963
Operating expenses.....	31,062	26,960	27,547	23,264	33,982
	<hr/>	<hr/>	<hr/>	<hr/>	<hr/>
Taxes.....	\$5,553	\$9,796	\$10,861	\$12,525	\$4,011
	1,111	1,225	1,515	1,210	2,276
Operating income.....	\$4,442	\$8,571	\$9,346	\$11,315	\$1,735

The figures down to and including 1916 represent operations from the 1st of July of the preceding year to the 30th of June of the year named. Those for 1917 represent the calendar year. This difference is, of course, due to the change made by the Commission in the fiscal year. Therefore the period between July 1 and December 31, 1916, is unaccounted for in the table, but there is evidence in the record showing that that period gave practically the same results as the preceding period. The company has outstanding bonds creating an annual interest charge of \$9000. In only two years of the five tabulated was the operating income of the company sufficient to pay this interest. The company is also burdened by interest on a deferred paving assessment. This interest item amounted in 1917 to \$1175. This item will grow less year by year as the tax itself is paid in twenty annual instalments. The accumulated corporate deficit December 31, 1917, was \$137,981.

In the light of the above figures it is hardly necessary to mention values. The road owns about eight miles of track and thirteen cars but no power house. The income for 1917 would yield a return of 8 per cent on an investment of less than \$22,000, and 6 per cent on an investment of less than \$29,000. It is perfectly obvious that the value of the property used in the public service must be very much greater than either sum. The operating expenses have not been great, and, as a matter of fact, they compare favorably with those of other railroads in the State of such size and such revenues as to justify comparisons. We can take notice of the general advance in the cost of materials and labor. This is sufficient to account for the considerable increase of the expenses in 1917 over those of the year ended June 30, 1916. It is probable that there will be further increases before there are decreases. The right of the company to additional revenue is unquestionable.

In fixing a proper tariff some complications are presented. The city council passed a resolution recommending that the

company be permitted to charge the rates of fare which the Commission has determined to authorize, for a period of six months from May 1, 1918. Assuming that the traffic for the next year remains unchanged as compared with 1917, and the taxes and operating expenses remain at the 1917 figures, the new schedule should yield a return of \$16,531.46 which is 8.32 per cent on the value of the property as determined by an appraisal made by the Public Service Commission as of December 31, 1916. The appraisal at that time, with additions during that year, was \$198,760. This would permit a dividend of 4 per cent and allow a balance to surplus of \$355.62. It is fair to assume that there will be some decrease in traffic due to the increase in rates, and it is not likely that expenses can be kept down to the 1917 figures. Therefore, the rates proposed, while apparently high, can not yield anything more than a moderate return. Under its agreement with the company, the city will be at liberty at any time after the six months' period expires to appeal to the Commission for a revision of the rates, and the Commission may then reduce them if a change in conditions or actual experience shows that they are too high.

There is in the record an agreement with the Board of Managers of the St. Lawrence State Hospital, which apparently was modified by the State Hospital Commission February 7, 1918, which provides as follows:

The fares to officers of the State Hospital, its attendants, employees, patients, and visitors, for one continuous ride upon the said road, from the terminus on the State Hospital grounds to any other point upon the line of said road in the city of Ogdensburg or from any point in the said city, shall not exceed the rate charged generally throughout the city, and any special rates and privileges which may be granted to the working people of the city, during certain specified hours of the day, shall be made to the employees of the hospital.

The Hospital Commission desires for its employees the benefit of the reduced fare provided in the tariff. The tariff itself seems to meet that suggestion.

All concur.

138 PUBLIC SERVICE COMMISSION, SECOND DISTRICT
P.S.C. 2d D.

In the Matter of the Petition of Poughkeepsie and Wappingers Falls Railway Company under subdivision 1, section 49 of the Public Service Commissions Law for permission to increase passenger fares. [Case No. 6095.]

1. The Public Service Commission is not precluded from granting an increase of fare to a street surface railroad in excess of a maximum fixed by a condition inserted in the written statutory consent of an abutting owner to the construction of the railroad as a consideration for the granting of such consent.

2. The extent to which so called intangible assets of a public service corporation as a component part of the capitalization upon which a return should be computed should be considered in a rate proceeding, discussed.

Decided June 6, 1918.

Appearances:

H. C. Hopson, 61 Broadway, New York city, for the petitioner.

George Worrall, 19 Market street, Poughkeepsie, N. Y., Corporation Counsel; and *James B. Way*, *Thomas D'Arcy*, and *J. W. McCornac*, committee of the Board of Aldermen, for the City of Poughkeepsie.

HILL, Chairman:

This is a petition that the Commission determine, pursuant to the provisions of subdivision 1 of section 49 of the Public Service Commissions Law, that the just and reasonable rates, fares, and charges to be hereafter observed and enforced as the maximum to be charged for transportation service performed by the petitioner within the limits of cities and incorporated villages, shall be the sum of six cents per passenger without change in transfer privileges now permitted, and that so far as the petitioner furnishes service without the limits of cities and incorporated villages it shall also be permitted to make a like increase in its rates, fares, and charges for such service.

Petitioner operates a street surface railroad in the city of Poughkeepsie, some of the city lines extending a short distance across the corporate boundaries, and also operates an interurban line to the village of Wappingers Falls, seven miles distant. The uniform rate heretofore charged on the city line has been five cents with free transfers, with no additional fare for the ride beyond the city line; and with regard to these lines it is desired to increase the fare to six cents.

In none of the consents to the construction and maintenance of the railroad given by the municipality pursuant to the requirements of section 173 of the Railroad Law does there appear any condition attempting to limit the rate of fare except the condition required by that section to be inserted in all such consents, that the provisions of article 5 of the Railroad Law pertinent to such consent shall be complied with; and inasmuch as one of the provisions of that article reserves to the Legislature and through it to the Public Service Commission the right to "regulate and reduce" rates of fare, the Commission clearly has the power to either increase or reduce the statutory fare thus fixed. As stated by Pound J. in the matter of *Quinby and the City of Rochester v. Public Service Commission, 2nd Dist.*, 223 N. Y. 244, "the purpose of the Legislature was to prescribe for the regulation of statutory fares by a board which may be expected to pass equitably upon conflicting claims with its single purpose the common good even where a maximum rate had been fixed by the Legislature, . . . the Legislature merely fixed the rate *pro tempore*."

It appears, however, that an abutting owner on one of the highways through which the railroad operates, as a condition of the written consent required by law, required that a fare of not more than five cents should be charged for passengers between Vassar College and the New York Central Railroad passenger station (known as the Main Street line), and now invokes such limitation. We are of the opinion that

the condition thus imposed is ineffectual to bar an increase of the fare in excess of the amount stipulated. We do not believe railroad rates can be fixed by private contract. The regulation of rates is a governmental function, an exercise of the police power, and can not be controlled by private contract. (*Buffalo E. Side R. R. Co. v. B. S. R. R. Co.*, 111 N. Y. 132; *R. R. Commission Cases*, 116 U. S. 307; *Norfolk & Western Co. v. Pendleton*, 156 U. S. 667.)

Even were the rule otherwise, we doubt very seriously whether the limitation in question, which was exacted as a condition of the statutory consent, could become effective in any event. The constitutional provision which requires this consent [article 8, section 18] provides that the Supreme Court may, in case the abutting owners refuse their consent, make an order upon the report of a commission that the road "ought to be constructed," which order becomes a substitute for the consent. No provision is made for compensation or conditions in such a proceeding, which fact leads very naturally to the conclusion that the consent was not intended to be contractual in its nature, or to be the subject of compensation or condition, but like many analogous consents required by statutes is merely a step in a statutory proceeding by which the acting governmental body is enabled to secure the opinion of a group or class who are affected. A consideration promised for a statutory consent required as a condition of issuing a liquor license has been held to be against public policy and unenforceable. (*Riggs v. Ryan*, 121 A. D. 301.) In that case the court said: "By provisions such as are here involved the legislature of the State seeks to ascertain by an honest expression of the people of a certain locality whether or not certain other provisions of the statute shall have effect and be applicable to them. As before suggested, it is inconceivable that such expression may legitimately be made the subject of sale, and which notwithstanding must control the action of the State in that regard. . . . We wish to be understood as holding most emphat-

POUGHKEEPSIE AND WAPPINGERS FALLS Ry. Co. 141
Vol. VII.

ically that the agreement under which the defendant seeks to substantiate his counterclaim is void as against public policy." We think a fair construction of the constitutional provision referred to, and of the statutes which were designed to carry the same into effect [Railroad Law, section 171], is that the fixing of rates was reserved to the Legislature, acting either directly or through its agent the Public Service Commission, subject to the right of the municipality to fix a maximum [*Quinby case supra*], and that the requirement of the consent of the abutting owners or the order of the court in lieu thereof was intended to procure an expression of opinion from the owners or of the court as to the desirability of the improvement, *i. e.* whether or not the road "ought to be constructed," and not to admit of the consent forming a consideration for a contractual obligation on the part of the railroad.

There was no question raised on the trial as to the accuracy of the petitioner's proofs of its financial condition and the earnings and operating expenses, and the essential figures used for fixed capital investment are those which had been agreed upon as fair by representatives of the company and the Commission in a prior proceeding [case No. 5774]. Granting the substantial correctness of the basic figures, there seems to be no escape from the conclusion that the applicant has made its case for an increase of rates. The petitioner's exhibit No. 12 shows that for 1917 the amount available as return on invested capital was only 3.85 per cent, counting as such invested capital only the fair cost of physical property actually in service. As to the amount of the increase, the 20 per cent increase asked for would indicate additional revenues of about \$40,000, provided there was no falling off in the number of passengers. It is generally found, however, that an increase in rates does bring about a falling off in volume of traffic, and the testimony indicates rather clearly a reduction in volume of travel because of the recent closing down of some large industrial enterprises. It would seem

142 PUBLIC SERVICE COMMISSION, SECOND DISTRICT

P.S.C. 2d D.

fair, therefore, to estimate the probable increase on a six-cent basis as \$30,000 per annum instead of \$40,000.

There is no doubt that expenses will also increase materially. The average annual increase in operating expenses of all electric railways within the Second District from July 1, 1908, to December 31, 1916, was 6.9 per cent, and in taxes 8.4 per cent. Since that date it is common knowledge that very pronounced increases in both operating expenses and taxes have taken place, and a 10 per cent increase in operating expenses and 5 per cent in tax charges would be a very conservative estimate. Adding then to the \$33,471 available as a return on invested capital for 1917, \$30,000 additional revenue, and subtracting additional expenses and taxes of \$16,083 and \$638 respectively, would reach \$46,750 as an estimate of probable return on capital, if the proposed new rates are put into effect. This is 5.95 per cent on \$870,195, the cost of physical property and working capital, without deducting depreciation reserve, and disallowing as an operating expense the item of \$5000 hereinafter referred to credited to other intangible property.

The finding in detail of what the new schedule of fares should be outside of Poughkeepsie [Wappingers Falls branch] would require further study. There is no indication from any of the information now available, however, that an increase in the city fares from five to six cents, and a proportionate increase in fares without the city zone, would be likely to increase the return on the company's investment, however conservatively the latter may be computed, beyond a reasonable and necessary amount.

A question is presented in this case which, while not essential to its decision, involves important principles. That question is raised by the company's method of charging as part of its operating expense a fixed sum which is concurrently credited to the account "Other Intangible Capital". For the year 1916 this amounted to \$8000, and for 1917 \$5000, and it is assumed to be the intention of the company

to continue this practice until the unassignable intangible element in its fixed capital investment is entirely wiped out. The effect would be that eventually the indefinite intangible part of the company's book investment will have been replaced by definite tangible property. While such a result is desirable from every point of view, the question arises whether this cost should be borne by the stockholders or by the public. If it is admitted that this item is a legitimate addition to operating expenses, the admission carries with it the implication that about \$450,000 of intangible value in the company's book assets should ultimately be collected from the public in the rates charged for service, even though the intangible item may not be considered a part of the investment upon which a percentage return should be allowed. Most of the Commission's more recent orders recommending amortization of intangibles have provided that the charge should be made, not to operating expenses, but to "Deductions from Gross Income," the result being to lessen the amount of net income applicable to dividends, but not to increase the apparent necessary return on invested capital. In this particular case the allowance of the charge would not appreciably affect the company's claims, but some disposition should be made of the item. The designation of assets as intangibles does not necessarily imply that apparent assets so designated are of so indefinite a nature that they can not be described or defined or their value measured. But simply because such an item appears in the balance sheet it by no means follows that it should enter into the valuation of the property "used in the public service" upon which rates are fixed. The treatment of such entries would doubtless vary in different cases, depending upon the degree of certainty with which the nature of the intangible item is ascertainable, what that nature may prove to be, and the extent to which it can be made definite and measurable. For the purposes of this proceeding, the entire item of "Other Intangibles" has been excluded from the property valuation

used as a basis for a rate, the valuation used including only that of the physical property as above indicated, and the charges to operation of the items referred to are accordingly disallowed.

Upon the hearing a complaint was made on the part of the city of the quality of the service rendered by the petitioner, and a request was made on the part both of the city authorities and of the petitioner that an examination of the service be made by the Commission. This has been done, with the result that the Commission finds that petitioner has not at present all of the facilities necessary to a proper service and is not giving a proper service; on the contrary, the examination shows that the following improvements should be made to bring the petitioner's property to a point of fair efficiency:

1. That it replace the present single track on Main street between the car barn and Raymond avenue, a distance of 5384 feet, with a double track.
2. That it reconstruct its track through Montgomery street, Southeast avenue, Grand avenue between South avenue and Main street, on what is known as the South Side line, a distance of 12,461 feet.
3. That it repair its track on Main street between the Hudson River dock and the end of double track, a distance of 6007 feet. This track to be repaired in such a manner that when completed it can be classified as in good condition. Also that it repair its track through Market street between Main and Livingston streets, a distance of 4249 feet. This track to be repaired in such a manner that when completed it can be classified as in good condition.
4. That it repair its track on the Wappingers Falls line by the replacement of not less than 20 per cent of the ties, and properly ballast, surface, and align the track.
5. That it secure two additional modern double-truck cars for use on the Wappingers Falls division.
6. That it repair and improve its cars as follows:
 - (a) That all single-truck cars operated on the Main Street and North Side lines be equipped with an auxiliary hand-brake;
 - (b) That all cars be equipped with automatic deck ventilators;
 - (c) That all cars be equipped for prepayment operation, with folding steps and mechanically operated doors; also that bulkheads be removed;

POUGHKEEPSIE AND WAPPINGERS FALLS RY. CO. 145

Vol. VII.

(d) That all cars be equipped with proper route and destination signs (sides and front end), illuminated during hours of darkness;

(e) That the company cause every car to be in proper condition of cleanliness and sanitation before being put into service each morning, and that all cars on the Wappingers Falls division be swept at the end of each round-trip while in service.

7. That it install and put in operation, in the conduits in which it has rights, a 500,000 circular mill cable on Main street between North Water and Clinton streets, a distance of 6007 feet.

8. That it replace the present trolley wire on Main street from Washington to Clinton street, a trolley distance of 4350 feet; that it replace the present trolley wire, North Side line, on Washington street from Main street to Parker avenue, on Parker avenue from Washington street to North Hamilton, North Clinton street from College Hill to Cottage street, and on Cottage street from North Clinton street to Smith street, a total trolley distance of 8096 feet. On the South Side line: that it replace all of the trolley wire on this line, a total trolley distance of 13,121 feet.

9. That it replace 121 defective trolley poles, or secure equivalent attachments for trolley wire suspension.

10. That it equip its lines with a telephone system, with telephones at each scheduled meeting point and at the River and Vassar termini of the Main Street line, connected to the company's central office. This would require at least five additional telephones.

11. That it equip all of its single track, including the Wappingers Falls line, with automatic block signals, the present manually operated block signals used on the Main Street line to be replaced by automatic signals.

12. That it re-route its cars so as to equalize the headways on the North and South lines, or in some other manner reduce the present thirty-minute headway on the South line to at least twenty minutes: this recommendation is based on the conclusion that a thirty-minute interval on the South line is an unreasonably infrequent service; and on the fact that the North and South lines carry approximately the same number of passengers, the North being operated on a twenty-minute headway and the South line on a thirty-minute headway.

13. That in addition to the use of the sand car, which should be continued, it employ a man at all hours while cars are in operation to continuously sand the track when necessary on Main Street hill between Washington street and the Hudson River dock.

14. That it reconstruct the buffer at the dock terminus of the Main Street line.

146 PUBLIC SERVICE COMMISSION, SECOND DISTRICT

P.S.C. 2d D.

15. That it replace the present horse-drawn emergency wagon by an automobile truck.

16. That it increase its storage capacity to care for all cars so that none will be required to be stored inside street limits.

17. That during the first week in November, 1918, it make a count for three days of the number of passengers carried on each car on all lines: this count to be made on city lines on cars in both directions at the maximum load points; the count to be made on the Wappingers Falls cars in both directions at Franklin street. The result of this count to be furnished the Public Service Commission for its determination as to the amount of service which should be furnished next Winter.

It may be that the poor quality of the service thus pointed out would warrant the Commission in denying the company any increase in fares, because on principle, service should precede payment for service; and unless it were obvious that the increased revenues will be substantially all devoted to the bettering of the service, and that no part thereof is to be used for the payment of dividends until improved service is accomplished, the Commission would be extremely reluctant to grant any increase in the rate of fare.

The prayer of the petition is granted, upon the understanding that the service and property are to be improved substantially along the lines indicated before dividends are resumed, the terms of the order to be settled by the Chairman.

All concur.

In the Matter of the Petition of EDSON U. GAISER under chapter 667 of the laws of 1915 for a certificate of convenience and necessity for the operation of a stage route by auto buses in the city of Niagara Falls, it being proposed that the route should also be operated to Lewiston Heights, Lewiston, and Youngstown. [Case No. 6437.]

1. In passing upon an application for a certificate of convenience and necessity for the operation of a bus line or stage route from a central point in a city to the city line as part of a line extending over country roads, the consent of the city forbidding intracity traffic, the only question presented is whether public convenience and necessity require that the applicant should be permitted to bring traffic originating outside of the city limits within the city, and conversely to pick up passengers within the city to be conveyed beyond the city limits.

2. The Commission will not make use of its power to grant or withhold a certificate to operate along city streets for the purpose of indirectly regulating competition over or along rural highways.

Bartholomew et al., Stage Routes, 5 P. S. C. 2nd Dist. N. Y. 96, followed.

Decided June 6, 1918.

Appearances:

Dudley & Gray, Niagara Falls, N. Y., for petitioner.

Morris Cohn, jr., Niagara Falls, for International Railway Company.

George C. Riley, 714 Ellicott Square, Buffalo, for Niagara Gorge Railroad Company and Lewiston and Youngstown Frontier Railroad Company.

B. L. Jones, 604 Ellicott Square, Buffalo, as Manager; *John Edbauer*, 604 Ellicott Square, Buffalo, as General Passenger Agent; and *E. E. Nicklis*, Niagara Falls, N. Y., as Superintendent, of Niagara Gorge Railroad Company and Lewiston and Youngstown Frontier Railroad Company.

Lieut. Charles S. M. Asinari, U. S. A., in person.

N. J. McDonough, Buffalo, Division Engineer, for State Highway Department.

HILL, *Chairman*:

The petitioner has, pursuant to law, procured the consent of the authorities of the City of Niagara Falls to the operation of a bus line from a central point in said city to the northerly line of the city, and now requests from the Commission a certificate of convenience and necessity pursuant to chapter 667 of the laws of 1915.

The petition discloses that after leaving the city line on the northerly course the line is intended to operate to and beyond Lewiston, the scheme being to serve, both from the north and the south, a country club now being established between Niagara Falls and Lewiston.

The effect of the statute referred to was to deprive the Commission of any authority it theretofore possessed, by the issuance or withholding of certificates of convenience and necessity, to control or regulate competition of bus lines or stage routes so far as they operate outside of the limits of incorporated cities, either among themselves or with other carriers.

The consent of the local authorities forbids the carrying of passengers between points within the city, and therefore the only question presented is whether public convenience and necessity require that the applicant, having already the right to bring passengers to the city limits and carry them from those limits outward, should be permitted to bring them within the city, and to pick them up within the city and carry them outward to the city limits. Objection is made on the part of the International Railway, the Niagara Gorge Railroad, and the Lewiston and Youngstown Frontier Railroad Companies, which operate tracks paralleling the petitioner's proposed route, but entirely upon the ground of the effect of the competition in that part of said route which lies entirely outside and north of the city line and over which the Commission has no jurisdiction whatever.

The Commission has heretofore held that it would be a usurpation of authority for the Commission to use its power

Vol. VII.

of granting or withholding a certificate to operate along city streets for the purpose of thus indirectly regulating competition over or along rural highways. (*Bartholomew et al., Stage Routes*, 5 P. S. C. 2nd Dist. N. Y. 96.)

The rights of the city have presumably been properly protected by the terms of the consent granted by the authorities, and the objecting railroads have been protected from competition by the terms of that consent so far as concerns intracity traffic. The good faith of the applicant is not questioned, and the evidence discloses that public convenience and necessity will be met by the petitioner being allowed to supply transportation to the new country club which will not be reached by any other public conveyance.

The certificate will therefore issue, and an order may be entered accordingly.

All concur.

150 PUBLIC SERVICE COMMISSION, SECOND DISTRICT
P.S.C. 2d D.

In the Matter of the Complaint of MARK I. KONN AS MAYOR OF THE CITY OF AUBURN *against EMPIRE GAS AND ELECTRIC COMPANY* as to prices charged the public (private consumers) for electricity; as to installation charge; as to alleged rebates. [Case No. 5918.]

In the Matter of the Complaint of EMPIRE GAS AND ELECTRIC COMPANY under section 71 of the Public Service Commissions Law as to price to be charged for gas and for consumer's charge in the city of Auburn. [Case No. 5960.]

In the Matter of the Complaint of REUBEN H. GULVIN AS MAYOR OF THE CITY OF GENEVA *against EMPIRE GAS AND ELECTRIC COMPANY* as to prices charged the public (private consumers) for electricity and gas; and as to installation charge for electricity, etc.; also Complaint of the Company asking that its rates may be increased (included in answer). [Case No. 5998.]

In the Matter of the Complaint of the TRUSTEES OF THE INCORPORATED VILLAGE OF PHELPS, Ontario county, *against EMPIRE GAS AND ELECTRIC COMPANY* as to prices charged the public (private consumers) for electricity and gas; and as to installation charge for electricity, etc.; also Complaint (included in answer) of the Company as to rates. [Case No. 5999.]

In the Matter of the Complaint of the TRUSTEES OF THE INCORPORATED VILLAGE OF SENECA FALLS, Seneca county, *against EMPIRE GAS AND ELECTRIC COMPANY* as to prices charged the public (private consumers) for electricity and gas; and as to installation charge for electricity, etc.; also Complaint (included in answer) of the Company as to rates. [Case No. 6000.]

In the Matter of the Complaint of the TRUSTEES OF THE INCORPORATED VILLAGE OF CLYDE, Wayne county, *against EMPIRE GAS AND ELECTRIC COMPANY* as to prices charged the public (private consumers) for electricity; and as to

installation charge for electricity, etc.; also Complaint (included in answer) of the Company as to rates. [Case No. 6001.]

In the Matter of the Complaint of the TRUSTEES OF THE INCORPORATED VILLAGE OF WATERLOO, Seneca county, against EMPIRE GAS AND ELECTRIC COMPANY as to prices charged the public (private consumers) for electricity and gas; and as to installation charge for electricity, etc.; also Complaint (included in answer) of the Company as to rates. [Case No. 6002.]

In the Matter of the Complaint of the TRUSTEES OF THE INCORPORATED VILLAGE OF NEWARK, Wayne county, against EMPIRE GAS AND ELECTRIC COMPANY as to prices charged the public (private consumers) for electricity and gas; and as to installation charge for electricity, etc.; also Complaint (included in answer) of the Company as to rates. [Case No. 6003.]

In the Matter of the Complaint of EMPIRE GAS AND ELECTRIC COMPANY under sections 71 and 72 of the Public Service Commissions Law as to rates to be charged by it for gas in the cities of Auburn and Geneva, and in the villages of Seneca Falls, Waterloo, Phelps, Lyons, Newark, and Palmyra. [Case No. 6359.]

1. A gas and electric corporation operating in a group of municipalities filed tariffs embracing a consumer's charge, with the effect of reducing rates to the large consumers and increasing them to the smaller. Complaints were filed by each community against the new rates, and the corporation itself filed a petition asking the Commission to fix gas rates in one of the communities. While the taking of testimony was in progress costs and expenses became seriously affected by war conditions, and the corporation filed another petition asking for the fixing of higher rates for gas in all the communities. Negotiations were entered into between the corporation and the municipal authorities looking toward a compromise under the existing conditions. An agreement was substantially reached as to electric rates, and as to gas rates it was agreed to submit the matter to the determination of the Commission on the basis of a report made by an expert employed by some of the municipalities and information already in

152 PUBLIC SERVICE COMMISSION, SECOND DISTRICT

P.S.C. 2d D.

the possession of the Commission. In view of the emergency existing, the Commission fixed rates stated in the Opinion, based upon the agreement of the parties and the investigation of its own expert, to remain in effect for six months and thereafter until the Commission should fix higher or lower rates.

2. A contract between one of the municipalities and the predecessor of the present corporation fixed a maximum price for gas. The municipality and officers thereof obtained an injunction restraining the enforcement of the rates complained against as being in excess of that fixed by contract. A provision of the injunction order made it subject to modification if the rates should be superseded by rates fixed by the Public Service Commission, and provided that the Commission should not be restrained from proceeding with the investigation. The Common Council of the city passed a resolution authorizing the submission of the question of emergency gas rates to the Commission on the basis stated above.

Held, that the Commission was authorized by the action of the court and of the city council to fix rates in excess of those established by the contract.

3. In the existing circumstances the Commission should be mindful of the admonition of the President of the United States, based upon the action of the Comptroller of the Currency and the Secretary of the Treasury, to respond promptly to the necessities of the situation as regards the needs of public utilities; that they should also bear in mind the attitude of the War Finance Corporation in respect of supplying means for new capital expenditures; and while they should not fix rates unnecessarily high, they should not pursue a policy of starvation with the possible effect of depriving the public of its utilities.

Decided June 11, 1918.

Appearances:

Richard C. S. Drummond, City Attorney, for the City of Auburn, complainant.

Lapham & McGreevy (by Nathan D. Lapham), Geneva, N. Y., and *John S. Gay*, Seneca Falls, N. Y., for the City of Geneva and for the Villages of Phelps, Seneca Falls, Clyde, Waterloo, and Newark, complainants.

Lansing G. Hoskins, Geneva, N. Y., and *James T. Hutchings*, Rochester, for Empire Gas and Electric Company, respondent.

IRVINE, Commissioner:

The Empire Gas and Electric Company supplies gas and electric service in the cities of Auburn and Geneva, and the villages of Seneca Falls, Waterloo, Phelps, Newark, and Clyde. It filed, effective January 1, 1917, new tariffs imposing for each class of service and in each community a consumer's charge or service charge with commodity rates reduced from those previously obtaining. The result was to reduce rates to large consumers and to increase them to the smaller consumers. The company at the time disclaimed any intention of making use of the new rates for the purpose of increasing its revenues, and asserted that the change was made for the purpose of more equitably distributing the burden of the cost of service. Complaints were filed on behalf of each of the communities named except that in the village of Clyde there is no gas service and there is no complaint as to gas rates from that community. The City of Auburn did not complain in respect of gas rates because it relied upon what it considered a contract limiting the respondent to a maximum rate of \$1 a thousand cubic feet. The new rates, because of the service charge, would exceed this in the case of certain consumers. The City of Auburn thereupon instituted an action in the Supreme Court to restrain the respondent from enforcing its new tariffs; and the company on its part instituted a proceeding under section 71 of the Public Service Commissions Law asking that the Commission fix just and reasonable rates for the city of Auburn. While all these proceedings were pending the company filed another petition against all the communities, asserting that on account of changed conditions its costs had greatly increased, and asking the Commission to fix gas rates in all the communities.

The Supreme Court, Mr. Justice Clark presiding, July 12, 1917, granted an injunction as sought by the plaintiffs in that case, to wit Mr. Wackenhet, an alderman, and the Mayor and the City of Auburn. For convenience, all the

cases except the complaint of the company last filed were consolidated for the purpose of taking evidence, but because of the pendency of the injunction proceedings no evidence was taken specifically applying to Auburn gas rates although the injunction as finally framed permitted the Commission to make such inquiry.

It developed on the hearings that the contest practically centered upon the consumer's charge, and a vast amount of evidence was submitted, expert and otherwise, bearing upon the propriety of such a charge as a matter of principle and upon the reasonableness in amount of the charges imposed. The hearings continued until January, 1918, and briefs were filed in March, but the evidence was so closely confined to the question of the consumer's charge that the record was left without sufficient evidence to enable the Commission to fix proper rates if it should determine that the company's tariffs were unlawful or unreasonable. The war having during the pendency of the proceedings progressed to such an extent that costs of supplies and of labor had become seriously affected, the company sought a conference with representatives of the municipalities with a view of arranging, if possible, a new system of rates which would supply it the necessary revenue during the present emergency. Counsel for the communities and municipal officials, exhibiting a broad minded spirit and realizing the burden imposed upon the company by changed conditions, entered into such negotiations. At the first conference the company offered to abandon the consumer's charge, both gas and electricity, and to withdraw its appeal, then pending, from the judgment of the Supreme Court above referred to. In return, the company merely asked that the municipalities should give fair consideration to its statements and representations with respect to its need for additional revenue owing to the occurrence of war conditions. The municipalities called to their assistance two of the experts who had already testified on their behalf, with the result that one of

Vol. VII.

them, Mr. W. D. Bennett of Madison, Wisconsin, presented to the communities a report dealing chiefly with gas rates and proposing several tentative schedules, each one designed to produce approximately the amount of revenue to which he found the company entitled. The chief of the light, heat, and power division of this Commission was present at some of the conferences between the company's officials and the municipal officials. As a result the company, while protesting that the estimates were too low, agreed to accept them and to accept a proposed schedule of electric rates which met the approval of the Commission's division chief. The municipalities likewise agreed to accept this result as to electricity. Neither the company nor the municipalities were satisfied with the tentative schedule of gas rates presented by Mr. Bennett, but both sides finally agreed to submit the case to the Commission, to use Mr. Bennett's report, so far as it presented statements and estimates, as the basis for its determination, and authorized the Commission on this basis, and of course with general regard to the information already in its possession, to determine a proper schedule of gas rates.

The gas situation in the city of Auburn was complicated by the contract referred to and by the injunction proceedings. The judgment of Justice Clark which becomes final by reason of the agreement of the company to dismiss its appeal, and therefore constitutes a direct adjudication between the company and the City of Auburn, contains this provision:

Ordered, Adjudged and Decreed, that the foregoing directions and provisions of this judgment shall be subject to modification, however, upon the application of either party, upon notice at the foot of this judgment in the event that the terms of said contract rate as to said prices for gas furnished fixed thereby, to wit \$1.10 per thousand cubic feet gross, \$1 per thousand cubic feet net, with a minimum monthly rate of \$0.50, now effective under said contract as aforesaid, shall be finally superseded by rates fixed by the Public Service Commission of the State of New York; but unless and until said terms shall be superseded by rates fixed by such Commission, and such Commission shall determine such question, said directions and provisions of this judgment

156 PUBLIC SERVICE COMMISSION, SECOND DISTRICT

P.S.C. 2d D.

shall apply; and this judgment shall be without prejudice to the said proceeding instituted by the defendant and now pending before the Public Service Commission aforesaid; and said Commission is not restrained or enjoined from proceeding therewith.

The Common Council passed a resolution instructing the City Attorney to submit the question of emergency gas rates for Auburn to the Public Service Commission on the basis of the figures contained in the Bennett report as to the amount of revenue to be produced, and upon which the rates would be calculated, but not as to the rates either of them recommended in said report "which are not approved". It therefore follows that the Commission is authorized both by the judgment and by action of the city council to fix rates in excess of those established by the contract, provided it shall find that those rates are requisite in order to enable the company to earn a fair return on the value of its property used in the service of gas in the city of Auburn.

The Commission has caused to be made a careful examination of the affairs of the company on the basis submitted, and has determined upon a rate which probably will not be entirely satisfactory either to the company or to the municipalities. As theoretical rates they are not satisfactory to the Commission, but all concerned are confronted by a very practical and very serious condition which requires for the moment the discarding of theories as to scientific rate making. All parties to the controversy are to be congratulated and commended for taking such action as will enable the Commission to fix emergency rates without a prolonged investigation involving perhaps a valuation of the company's properties in each community, and which would be conducted at a time when costs are shifting so rapidly that whatever time might be taken as the basis of the calculation, the situation would probably be materially changed while the investigation was in progress.

In fixing these rates the Commission has not been unmindful, and in agreeing to submit the matter in this peculiar form to the Commission's determination the municipalities

Vol. VII.

have not been unmindful, of the warning given by the Comptroller of the Currency in his report for 1917, and by the Secretary of the Treasury in his letter to the President of February 15, 1918, that the existing conditions have thrown upon many of the public utility corporations strains which they are unable to endure without prompt help. Indeed, the Secretary of the Treasury in terms requested the state and local authorities to respond to the demand for additional revenue on behalf of the utilities as an essential aid in carrying on the war. The President, by letter dated February 19th, fully endorsed the attitude of the Secretary of the Treasury, and said, "I hope that state and local authorities, where they have not already done so, will, when the facts are properly laid before them, respond promptly to the necessities of the situation".

It is difficult for public utilities to obtain necessary capital at this time except through the War Finance Corporation. This corporation has made a statement substantially as follows:

The directors of the War Finance Corporation do not feel that they have authority under the law to make loans except upon adequate security as required by the act, and they are convinced that the inability of a utility company to earn a sum at least sufficient to pay its fixed charges, taxes, maintenance, and repairs is conclusive evidence of the inadequacy of its own obligation as security. The directors of the corporation feel that the localities served by these various public utility enterprises should not expect the War Finance Corporation to make advances to any utility company whose statement shows that it is in actual need of increased revenue. It is a matter for the local authorities to determine whether or not an increase in rates sufficient to maintain the enterprise as a going concern should be granted.

It is urged, therefore, that the proper authorities give prompt consideration to applications made by public utilities for permission to increase rates, in order that the directors of the War Finance Corporation may know when applications for loans are presented by public utility corporations whether or not they will be able to give adequate security.

It is evident from this that if the public service corporations are to be permitted to make the most necessary exten-

158 PUBLIC SERVICE COMMISSION, SECOND DISTRICT

P.S.C. 2d D.

sions and improvements, or even refund outstanding capital obligations, the Commission must insure to them such rates as will yield a revenue meeting the requirements of the War Finance Corporation. It is not proposed to permit rates that are unnecessarily high, in the present emergency; nor is it proposed to pursue a starvation policy, which if the war should long continue would inevitably deprive the public of all its utilities. The rates now fixed are emergency rates, and are made effective only for a period of six months from the effective date of the new tariffs and thereafter until the Commission shall upon its own motion or upon complaint fix higher or lower rates. Because of the manner in which the case is submitted, and because the rates are emergency rates, no detailed valuations, calculations, or estimates need be recited in this Opinion. The rates determined upon are as follows:

GAS

General Rate: Available to all consumers:

Net Rate: First 1000 cu. ft. per month, \$1.50 per M cu. ft.; next 1000 cu. ft. per month, \$1.25 per M cu. ft.; all over 2000 cu. ft. per month, \$1.10 per M cu. ft.

Minimum Charge: Fifty cents per month per meter.

Prompt Payment Discount: Gross bills to be rendered with 10 per cent added to net rate, and discounted to net rate if paid within ten days from date of bill.

ELECTRICITY

General Lighting Rate: Available to all lighting consumers, including incidental use for heat or power by such small appliances as may be connected to the lighting circuit:

Net Rate: First 10 kilowatt-hours per month, 13 cents per kw.h.; next 30 kilowatt-hours per month, 10 cents per kw.h.; all over 40 kilowatt-hours per month, 7 cents per kw.h.

Minimum Charge: \$1 per month per meter.

Prompt Payment Discount: Gross bills to be rendered with 10 per cent added to net rate, and discounted to net rate if paid within ten days from date of bill.

The foregoing rates are not intended to interfere with, or prevent the establishing of, rates applicable to large quantities or to special classifications of service.

It is estimated that these rates will afford such an increase in revenue as should insure the payment of interest on the funded debt and dividends upon the preferred stock. They should also provide a moderate surplus available for dividends on the common stock. They certainly will not yield as large a return as might reasonably be expected in normal times. We think, however, that the public service corporations must and do expect to submit to their share of the common sacrifice, and that neither the appeal of President Wilson nor the ruling of the War Finance Corporation had in view the maintenance in all cases of normal profits.

All concur.

160 PUBLIC SERVICE COMMISSION, SECOND DISTRICT

P.S.C. 2d D.

Petition of GENEVA, SENECA FALLS AND AUBURN RAILROAD COMPANY, INC., under subdivision 1, section 49, Public Service Commissions Law, for permission to increase passenger fares. [Case No. 6081.]

1. After an investigation it was found that the applicant is entitled to a greater revenue in order to earn a fair return on the value of the property used in the public service.

2. The applicant operates urban lines in the city of Geneva, and also an interurban line from Geneva to Waterloo, Seneca Falls, and Cayuga Lake Park. The applicant is a reorganization after a foreclosure of a predecessor corporation. At the time of the reorganization this Commission made a valuation of the property. This valuation was used in the present case, and values, revenues, and expenses were, as nearly as practicable, apportioned between the urban lines and the interurban.

3. In determining whether an increase should be permitted on the Geneva urban lines, although it was found that the rate of return thereon is at present greater than the rate of return on the interurban line, in view of recent increases on the interurban line, it was

Held, That the Commission must take into account the practical consideration of what the traffic will bear and so adjust rates that there may be an increase rather than a decrease in revenues, therefore that the Geneva rates might properly be increased.

Decided June 20, 1918.

Appearances:

L. G. Hoskins, Geneva, for the applicant.

IRVINE, Commissioner:

The petitioner is an electric railroad company operating locally in the city of Geneva, and by means of what is commonly known as an interurban line, in the town and village of Waterloo, and the town and village of Seneca Falls to Cayuga Lake Park, in the town of Seneca Falls. It seeks permission to increase its rates from five to six cents within the city of Geneva and for a short distance on the interurban

GENEVA, SENECA FALLS AND AUBURN R. R. Co., INC. 161
VOL. VII.

line outside the city in the town of Waterloo. There has been in effect in the past what is characterized in the record as a five cent zone covering the city and this portion of the line in the town of Waterloo. It is desired to keep the zone limits on the system as they now are and to make the fare within this zone six cents. Two lines are operated in the city of Geneva. Transfer privileges exist between the two. One is operated as a part of the interurban line. This commingling of urban and interurban traffic presents difficulties in determining the merits of the present case.

Following is a comparative balance sheet of the company for the years stated:

162 PUBLIC SERVICE COMMISSION, SECOND DISTRICT

P.S.C. 2d D.

	Reorganiza- tion July 1, 1913	June 30, 1914	June 30, 1915	June 30, 1916	June 30, 1917
<i>Assets:</i>					
Cash	Dollars 16,905.30 841.90	Dollars 7,839.78 937.44	Dollars 14,006.95 3,327.85	Dollars 1,782.55 1,129.11	Dollars 1,238.70 1,165.37
Other accounts receivable					
Total current assets					
Materials and supplies					
Total floating capital	17,747.20	8,477.22	17,334.80	2,911.66	2,395.07
Mortgaged or pledged investments					
Pledged capital					
Prepayments					
Unamortized debt discount and expense					
Other suspense debit balance					
Corporate deficit					
Totals	24,738.13	16,288.73	33,939.81	10,654.73	10,498.19
<i>Liabilities:</i>					
Taxes accrued					
Interest accrued on funded debt					
Interest accrued on unfunded debt					
Miscellaneous bills payable due on demand					
Miscellaneous bills payable due on time					
Miscellaneous accounts payable					
Total unfunded debt					
Mortgage bonds					
Debentures					
Total funded debt	44,896.50	31,832.91	27,521.12	59,076.65	55,320.43
Accrued amortization of capital					
Casualties and insurance reserve					
Total reserves	46,521.84	51,077.84	29,927.86	61,880.49	58,013.46
Common stock					
Corporate surplus					
Totals	678,621.84	697,502.79	739,532.89	759,406.42	753,193.13

GENEVA, SENECA FALLS AND AUBURN R. R. Co., INC. 163
Vol. VII.

A corporate deficit for the year ended June 30, 1916, of \$7228.76 was converted into a corporate surplus of \$554.57 chiefly through an increase in interurban rates. (Case No. 5761.)

No difficulties are presented on the question of the entire value of the corporate property, because when the company was reorganized as a result of foreclosure proceedings in 1913 the Commission made a valuation of the property and the new company's books have been kept with reference to that valuation. The value then placed upon the property was \$577,456.50. Adding to this the fixed capital installed, and deducting retirements, we have a valuation as of December 31, 1917, of \$622,815.76; and of this only \$33,083.42 is classed as intangibles.

It seems clear that on the basis of the 1917 operations alone the company is entitled to receive a very considerable increase in revenue. It however appears that beginning with 1917 the corporation has been setting up a depreciation reserve, according to a rule filed with the Commission, the annual charge ranging from 2 per cent to 5 per cent on different classes of its depreciable property. This charge for 1917 exceeded that for 1916 by \$16,464. If this should be deducted from the expenses, the result would be materially affected. We do not think it should be deducted. While the Court of Appeals has recently held that the Commission is without authority to require a particular sum to be set aside as a depreciation reserve, *People ex rel. N. Y. R. Co. v. Pub. Serv. Comm.*, 223 N. Y. 573, it by no means follows that such a reserve should not be provided; in fact, it is of great importance that the corporations should be encouraged in providing such a reserve even though the Commission may not be at present empowered to require it. As it stands for current wearing out and obsolescence, it is a proper expense chargeable against the patrons of the utility. It is possible that this company is now providing too high a rate, but the present company took the property at depreciated

values, and the percentage of depreciation on property which has perhaps served half its time is necessarily greater than the percentage that should be calculated on new property.

It does not follow that because the company is entitled to greater revenue it should be derived from the Geneva fare zone. It has been difficult to apportion the valuation, revenues, and expenses between this zone and what may be called the interurban line. At best they can only be approximated as to certain items. In the main the apportionment suggested by the petitioner, where a direct allocation is not possible, has been adopted, but in some respects the Commission has used another basis. It is unnecessary to enter into details as the differences are not very material. The entire subject, however, is covered by a memorandum prepared by the division of statistics and accounts of the Commission and in the files of the case. Using the year ended December 31, 1917, the total revenue amounted to \$107,241.02, of which \$37,739.92 is attributable to the Geneva zone and \$69,501.10 to the interurban line. Of the total operating expenses for 1917, \$28,463.99 is apportioned to the Geneva zone and \$51,393.97 to the interurban zone. An apportionment of values, for the most part by direct allocation, shows for the Geneva zone a total investment of \$195,955.32; interurban, \$426,860.44. This indicates a rate of return of 4.13 per cent on the investment in the Geneva zone and 3.12 per cent on the interurban investment. The investment apportionment is the total book cost of fixed capital in service without deducting the depreciation reserve or without adding anything for working capital.

The interurban line is from Geneva to Seneca Falls on village streets and on improved highway. The corporation is subject to automobile competition, and the rates are now at such a point that a further increase might lessen the revenue. This practical consideration of what the traffic will bear must be taken into account. By so doing we reach the conclusion that the increased return must largely come from the city system.

GENEVA, SENECA FALLS AND AUBURN R. R. Co., Inc. 165
Vol. VII.

It is fair to assume that the increase in rates will cause some falling off in travel, and it is certain that the operating expenses will be increased. Assuming a 10 per cent decrease in traffic and a 5 per cent increase in operating expenses and taxes, it is estimated that the new rate will still leave a deficit of about \$9300 after paying interest and providing for the amortization of debt discount and expense, and will yield only 3.21 per cent on the value of the property. The corporation, however, does not ask for more than six cents in the Geneva zone, and it is more than doubtful whether any greater increase would operate to relieve it.

All concur.

166 PUBLIC SERVICE COMMISSION, SECOND DISTRICT
P.S.C. 2d D.

In the Matter of the Complaint of the **MAYOR OF BATAVIA**
against ALDEN-BATAVIA NATURAL GAS COMPANY as to
service. [Case No. 6283.]

The time has come in Western New York when consumers of natural gas must avoid waste and conserve the supply of gas.

The only sure and permanent remedy to cure the shortage of natural gas is to procure a supply of manufactured gas to be mixed with the natural product in times of emergency. The New York Commissions have no power to order a gas company to adopt this plan of relief.

Gas companies should not be allowed to collect the full amount of their bills unless they render full return. The public should and does expect to pay a fair price for good service but it should not be compelled to pay for what it does not get.

Decided June 20, 1918.

Appearances:

David D. Lent, Esq., City Attorney, for the Mayor of Batavia.

Hon. William F. Haitz, Mayor, in person.

Williams, Minard and Howell for the Alden-Batavia Natural Gas Company.

BARHITE, Commissioner:

This is an application by the Mayor of the City of Batavia for relief against the manner in which the Alden-Batavia Natural Gas Company distributes its product in that city. During the period of cold weather the pressure is low, uncertain, and varies at different times of the day and the night. As a result, those who depend upon natural gas for light and heat suffer greatly. The health and even the lives of the weak, the sick, and of children are in danger; meals can not be cooked; the pressure of the gas drops to a point where the flame is extinguished, and then with a sudden increase of pressure the gas enters the dwelling making residence

therein dangerous. The cause of this condition is a lack of a sufficient supply of natural gas to keep a proper pressure and supply all who may desire to use this cheap, cleanly, and easily handled fuel. There is plenty of evidence that the fields that furnish Western New York with natural gas are no longer able to replace the increasing drain upon their resources. Like other products of nature which are useful to man, which are cheap and apparently limitless in amount, natural gas has been used with a ruthless and a wasteful hand: lights are burned by day as well as by night because it is cheaper to pay for the gas than it is to put it out and re-light it; furnaces originally not intended for the use of gas and not fitted for that purpose are cheaply transformed and enormous quantities of gas used, and a great part of the heat wasted because the heating plant is unsuitable in character for the service it is expected to perform. In domestic life the gas is allowed to burn needlessly hour after hour. Manufacturing establishments and industrial businesses of various kinds burn the gas in enormous quantities and with no attempt at economy.

On the other hand, the companies are not without fault. With the evidence of a constantly diminishing supply and a continually increasing demand, no attempt to solve the problem has been made by them. New wells have been dug, but the result has been uncertain and in most cases without permanent value. Applications from new customers have been encouraged although received with the certain knowledge that gas could not be furnished to supply the added demand. There does not appear to have been any earnest attempt to find a track across the constantly increasing space between the supply and the demand. The only sure and permanent remedy, namely the erection of a plant to supply manufactured gas to be mixed with the natural product during times of need, has not been used, and this remedy the Commission has no power to compel the company to adopt. The situation has been growing worse until the time

has come when necessity compels a decision which must pass upon conflicting interests and which must seek to relieve if it does not cure.

The above remarks are of course general and apply as well to other Western New York cases as to the one at bar.

It appears from the facts that the total consumption of natural gas in the city of Batavia for the month of November, 1917, was 34,290,000 cubic feet, divided among 3611 customers, or practically 9496 cubic feet to each customer. Taking twice the average consumption, or 20,000 cubic feet, and designating those domestic users who use more than that amount as "large consumers," we find 262 in that class whose total monthly consumption was 9,061,000 cubic feet, or an average of 34,584 cubic feet per unit. The twenty-five industrial users consumed 3,108,000 cubic feet, or an average of 124,320 cubic feet. A trifle less than 8 per cent of the customers consume nearly 35 per cent of the product. There is nothing wrong about this situation provided there is a plentiful supply of gas. But if there is not such supply, and its production can not be compelled by this Commission, then we must seek for a more equitable distribution. If by curtailing or stopping the supply of gas to those who have been designated as "large consumers" during the winter months all users may enjoy a more adequate and constant supply and pressure, then the requirements of 287 persons should not be permitted to imperil the comfort and needs of the other 3324 users. As the weather grows colder we find that the "large consumers" use a higher percentage of the total number of feet consumed.

One of the most important things in conserving the supply of natural gas is to avoid waste. Customers should be directed to turn off the gas promptly when not in use. Appliances not originally intended for the use of natural gas should not be permitted to be used. This includes furnaces built for coal burners but which have been changed for use with gas.

Customers who refuse to use reasonable care and economy should after fair warning have their pipes disconnected from the company's mains. Industrial plants should not be permitted to use the gas when it is so sorely needed by the domestic consumers. Many manufacturers use several hundred thousand feet per month in running gas engines, heating in forges, soldering and tempering, etc. Natural gas is well adapted for these purposes but is not a necessity. If gas is needed, there are kinds other than the natural which may be produced and employed. One firm in Batavia has reduced its use of natural gas from a monthly average of 1,352,000 cubic feet to an average of 352,000 cubic feet. There are very few lines of business in which a substitute may not be found. The Public Utilities Commission of Ohio has recently made an administrative order which divides all consumers of natural gas for the purpose of curtailing service during an emergency into two classes, "Domestic Consumers" and "Industrial Consumers," and provides that the domestic consumer shall be first entitled to the use of the gas when there is not enough for all.

Under the Ohio classification, the term "Domestic Consumers" includes "users of natural gas for heating, lighting, and cooking in private houses, boarding houses, and apartment houses; and users of natural gas for lighting and cooking only in hotels, restaurants, bakeries, eating places, club houses, hospitals, and other charitable institutions". In cases where natural gas is used for scientific, experimental, or mechanical purposes, in limited quantities not to exceed 5000 cubic feet per month to each customer, the user is considered to be a domestic consumer. All other customers are included in the term "Industrial Consumers". The last named class is further subdivided, but in the case under consideration it is not necessary to discuss such subdivision. It is proper to say that during the present period every kind of business which is engaged in the production of materials needed by the United States Government for war purposes,

and which can not conveniently use fuel other than natural gas, must have preference even over the domestic consumer.

The rule of the Ohio Commission seems to be rather broad in its designation of those who shall be deemed to be in the preferred class. Hotels, restaurants, and eating places, for example, perform in part for humanity the same kind of service furnished by the private house, and yet they are strictly speaking industrial pursuits and are conducted solely as a business for profit: for the same purpose that a manufacturing plant, a store, or other business establishment is conducted; a club house is of a semi-public nature, admitting within its walls a certain selected membership; hospitals and other charitable institutions are for the public. All of the various kinds of places named above are usually very large consumers of gas, and do much to deplete the supply and to take away from the strictly domestic consumer the share to which he is entitled. This discussion with regard to the classification of the Ohio Commission is not intended as criticism, but is had for the purpose of calling attention to the fact that a strictly scientific and perfect division of users of natural gas can not be laid without classes being too numerous and too cumbersome for practical results. In fact, for the purpose of conservation and to determine the order in which users of natural gas shall be disconnected from the company's mains in times of shortage, a classification based solely upon the purposes for which the gas is used without considering the amount used would be unjust, for experience has taught that while the majority of the consumers in one class will only use a moderate amount of gas and but the number of feet actually needed, others will tap the source of supply with a more liberal hand and not consider the rights or welfare of others.

The conclusion naturally follows that unless nature has in her storehouse untold supplies of natural gas which are not now but are soon to be disclosed to waiting customers, or unless companies engaged in the business either volun-

tarily or by force of proper legislation or of public opinion take steps in time of emergency to supply themselves with manufactured gas to be mixed with and supply the deficit in the amount of the natural article, then the relief must be—for it is a relief and not a permanent cure—that this Commission must divide the supply in such a way as in its judgment seems most equitable and just, and restrict its use in such a manner that all who are served may have a fair and reasonable supply. When this is done, if the serving company does not maintain a proper and fairly steady pressure, then other measures can be taken which will have the tendency to insure good service. Companies should not be allowed to collect the full amount of their bills unless they render full return. The public should and does expect to pay a fair price for good service but should not be compelled to pay for what it does not get.

All industrial users during the months of December, January, February, and March, in each and every year, except those engaged in supplying goods to the United States Government for war use, should not use natural gas. As noted above, the average amount used during the month of November, 1917, was 9496 cubic feet. During the month of December, a much colder month, the average amount used was 8810 cubic feet.

If we allow the use of 25,000 cubic feet per month for each domestic consumer during the months named, every reasonable requirement will be met.

Each consumer under such a rule will be permitted to use more than two and one-half times the average consumption. Expert evidence in possession of the Commission is to the effect that the average amount of natural gas used by the domestic consumer in peak-load times is 700 cubic feet per day, or 21,700 cubic feet per month. When gas is used largely for heating the consumption ranges in some cases as high as 1500 cubic feet per day. The maximum amount to be used by each person, namely 25,000 cubic feet,

172 PUBLIC SERVICE COMMISSION, SECOND DISTRICT
P.S.C. 2d D.

will in the great majority of cases be sufficient. If injustice is done in any particular case, that case may be considered alone by the Commission.

All concur.

GALGANO ET AL. v. WESTCHESTER LIGHTING CO. 173
Vol. VII.

In the Matter of the Complaints of FRANK GALGANO, DOMINICK TELESCO, CHARLES LORD, and JOHN LAMBERT, JR., of New Rochelle *against* WESTCHESTER LIGHTING COMPANY, asking that mains be laid and they be supplied with gas at their residences. [Case No. 6267.]

In the Matter of the Complaint of EDWARD STETSON GIFFING, as Mayor of New Rochelle, *against* WESTCHESTER LIGHTING COMPANY, asking that gas lamps be furnished to light streets in Highland Park. [Case No. 6306.]

The authority of the Public Service Commissions of New York state to order extensions to the plant of a gas corporation or an electrical corporation is limited by statute; only a reasonable extension may be ordered.

It is not reasonable to require a corporation to lay over 1800 feet of mains at a cost in excess of \$3800 for the purpose of supplying five dwelling houses, two of which are not piped for gas, and ten street lamps with gas, and there is no prospect of any additional demand in the immediate future, and it is possible to obtain electricity for light.

Decided June 27, 1918.

Appearances:

H. G. K. Heath, Esq., of New York city appeared for the complainants in case No. 6267.

G. C. Otto, Esq., of New Rochelle appeared for the complainant in case No. 6306.

Messrs. John J. Crennan of New Rochelle and Martin S. Decker of Albany appeared for the respondent in both cases.

BARHITE, Commissioner:

The above cases were brought against the same defendant; they relate to the same matter, they were tried together, and may properly be considered in one memorandum. In case No. 6306 the Mayor of the City of New Rochelle asks that the Commission issue an order directing the Westchester

174 PUBLIC SERVICE COMMISSION, SECOND DISTRICT
P.S.C. 2d D.

Lighting Company to install ten gas lamps in the public streets of a section of the city known as Highland Park. In case No. 6267 the complainants Galgano, Telesco, and Lord live upon Alpine Road, and the complainant Lambert upon Errol Place, and ask that mains may be laid and gas furnished at their several dwellings. The streets connect with Perth avenue. All of these streets are in Highland Park. Whether or not Perth avenue, Alpine Road, and Errol Place are in reality public streets was sharply contested upon the trial, but in view of the position taken upon the merits of these applications it is unnecessary to pass upon that question.

A map of Highland Park was filed in 1896. That the particular part of the Park under consideration has not been a popular residential section is shown by the fact that the proposed extension, if made, will serve only five houses, two of which are not piped for gas. The company has no other requests for gas from lot owners in the section under consideration. No application has been made to the building department of the city for permits to erect buildings. There are no improvements in the vicinity, no established grades, no sidewalks, no sewers, no curbs. Photographs were submitted in evidence which show that the so called streets do not reach the dignity or possess the attainments of an ordinary country road. In one street there is water furnished by a private water company. There are no street signs. Previous to June, 1917, no work was done upon any of those streets by the city; after that date some work was done upon one of those streets "to make it firm, to make it passable for us," one of the witnesses testified.

There are two routes which might be used for the desired extension: routes Nos. 1 and 2. Route No. 1 is 1836 feet in length; route No. 2 is 1928 feet in length. Over route No. 1 to meet the wants of the city and the requirements of the five possible private consumers would cost the company \$3820.29; leaving out the street lighting the cost would be \$3540.60. To serve the five possible consumers would

require the construction of 367 feet of gas mains per consumer as against an average construction of 49.8 feet per customer. The estimated yearly consumption of gas for the five consumers based upon the average yearly consumption of private parties throughout the city and upon the yearly amount which had been used by two of the prospective customers in other parts of the city is 115,000 cubic feet, yielding a gross income of \$126.50. The present rate is \$1.10 per thousand feet without discount. For the ten street lights under its contract with the city the company would receive \$260. Of this amount, for lighting and extinguishing and lamp maintenance work, the company would pay \$120, leaving net \$140. The ten lamps would burn 140,000 feet of gas per year which makes the rate for public lighting \$1 per thousand feet. The estimated cost of the manufacture of gas for the year 1918 was 94.98 cents per thousand cubic feet. The actual cost for the first three months of the year was 98.65 cents per thousand cubic feet, and this cost will increase rather than diminish.

The above figures show a profit of \$14.94 upon an investment of \$3800. While an extension to the plant of a public service corporation may be required although it is shown that such extension may not bring in a profit, there is a limit beyond which extensions should not be ordered: that limit is found in the terms of the statute [Public Service Commissions Law, Article IV, section 66, subdivision 2]. This Commission is given power to order *reasonable* improvements and extensions.

The contract between the city and the company provides that the number of gas lamps may be at any time increased "along the lines of gas mains". Under the clause quoted the attorney for the Mayor at the hearing admitted that the interest of the city was secondary to that of the other complainants; that unless the Commission orders the extension of the mains for the private complainants the case of the city will fail.

176 PUBLIC SERVICE COMMISSION, SECOND DISTRICT

P.S.C. 2d D.

Taking into consideration the cost of the proposed extension, the limited demand for gas arising from the extension, the slight prospect for any further demand in the future, the high price and difficulty of obtaining labor and materials at the present time, the lack of real need for the extension, the prayer of the petitioners should be denied until such time as changing conditions may be more suitable for the request. This conclusion will not prevent the installation of proper facilities for lighting, as the house of one of the complainants is already lighted with electricity; and the dwellings of the others, and the streets if necessary, can be supplied with light in the same manner.

All concur.

RESIDENTS BINGHAMTON ET AL. v. BINGHAMTON RY. CO. 177
Vol. VII.

In the Matter of the Complaint of RESIDENTS OF BINGHAMTON AND JOHNSON CITY against BINGHAMTON RAILWAY COMPANY as to proposed stopping of sale of certain passenger tickets, and on the Commission's own initiative.
[Case No. 6352.]

Decided June 27, 1918.

Appearances:

Harry C. Perkins attorney for complainants.
Curtiss, Keenan & Tuthill attorneys for Binghamton Railway Company.

FENNELL, Commissioner:

There was filed with this Commission on February 15, 1918, a complaint from residents of Binghamton and Johnson City and other nearby places against Binghamton Railway Company protesting —

1. The proposed discontinuance by said company on February 25, 1918, of the sale of a twelve-ride ticket book good for passengers between Binghamton and Endicott, which is sold for one dollar, making each ride cost $8\frac{1}{3}$ cents: this book is good only during rush hours morning and evening and has no transfer privileges in Binghamton. The complaint alleges that this book has been sold for over thirteen years, and has enabled employees of manufactories at Endicott to live in Binghamton where better housing facilities are available than in Endicott; that with this book withdrawn the lowest rate left is one of twenty-five cents for the round trip between Binghamton and Endicott, the regular one-way fare being fifteen cents;

2. The proposed discontinuance by said company on February 25, 1918, of the sale of a twelve-ride ticket book good for passengers between Johnson City and Endicott, which are sold for sixty cents: this book is good only during rush hours morning and evening on certain cars; with this

book withdrawn the lowest rate left is fifteen cents for the round trip between Johnson City and Endicott.

Three hundred and seventy-nine of the signers of the complaint live in Binghamton, 41 live in Johnson City, and 18 live in Port Dickinson, Hooper, Union, and Endicott.

The company had filed with the Commission a tariff showing that the sale of these books was to be stopped; and also that the sale of two other reduced rate book tickets between the city of Binghamton and Country Club station was to be stopped: but as to these Country Club station books no complaint has reached the Commission.

It appearing to the Commission that the stoppage of the sale of these books should not be permitted pending an investigation of the reasonableness of such action, the tariff was suspended until the 29th instant, and public hearings in the matter were held by Commissioner Fennell at Binghamton on March 15th and May 24th, at which those named above appeared, as well as certain of the complainants in person.

It appears from the evidence that the Erie railroad operates what may be called special trains to carry employees of the manufactories at Endicott and Johnson City to and from Binghamton, the fare on these trains being five cents each way, and that they carry from eight hundred to twelve hundred passengers between said points daily; it also appears that during the year 1917 passengers using said book tickets on the Binghamton railway between Johnson City and Endicott used an average of 56 per day, and between Binghamton and Endicott used an average of $60\frac{1}{2}$ per day. The answer of the company alleges that the cost of carrying the passengers using said book tickets is considerably in excess of the revenue received from them, and this was not contested at the hearing; that the revenue per mile under the dollar book is less than half a cent counting the round-trip of the car, and about the same under the sixty cents book; that a special service is required.

RESIDENTS BINGHAMTON ET AL. v. BINGHAMTON Ry. Co. 179
vol. VII.

The Commission believes the oral evidence and papers establish that the cost is greater than the revenue from these books and that the company should no longer be compelled to issue them. This is not a finding that under all circumstances return must equal cost in such cases; but in this case, comparatively few using these books, a special service being required, and it being evident that the Erie railroad carries most of the employees in this territory, the Commission concludes it would be unjust to require the company to continue the sale of said books.

Accordingly an order will be entered annulling the suspension of the portion of the tariff in question and dismissing this complaint.

All concur.

180 PUBLIC SERVICE COMMISSION, SECOND DISTRICT

P.S.C. 2d D.

In the Matter of the Complaint under sections 71 and 72, Public Service Commissions Law, of **GEORGE W. LANE, AS MAYOR OF CORNING, against CRYSTAL CITY GAS COMPANY** as to proposed increase in price of natural gas furnished customers. [Case No. 6340.]

Where a natural gas company has in past years earned a fair return on the value of its property used in the public service, an increase in rates is not justified by a showing that the industrial use of gas will have to be suspended and that the income would thereby be diminished, where such industrial use appears not to have been actually suspended and the evidence shows merely a theoretical calculation of loss of income based on the assumption of such suspended sale for industrial purposes.

Decided July 9, 1918.

Appearances:

Justin V. Purcell, Corning, N. Y., for complainant.

Thomas F. Rogers, Corning, N. Y., and Neile F. Towner, Albany, N. Y., for respondent.

IRVINE, Commissioner:

The Crystal City Gas Company supplies natural gas in the city of Corning. Its rates for domestic consumers were in the past 45 cents gross per thousand cubic feet, with a discount of 5 cents for prompt payment and a minimum charge of one thousand cubic feet per month. A tariff was filed, effective March 1, 1918, increasing the price to 58 cents gross, with a discount of 5½ cents for prompt payment and a minimum charge of two thousand cubic feet per month. The Mayor of the city complained against the new rates as unreasonable. Hearings were had at which a large volume of testimony was taken, but decision has been withheld awaiting an expected determination by the Appellate Division in another case involving the effect of a franchise limitation upon the authority of the Commission, the Corn-

ing franchise limiting the price to 50 cents per thousand cubic feet. The Appellate Division having adjourned for the summer recess without determining the case referred to, it has been deemed proper for the Commission to proceed and decide this case upon its merits.

We think the complaint must be sustained taking the evidence in the light most favorable to the company. The company introduced evidence tending to show a reproduction cost of fixed capital of \$170,536, with an estimated depreciation of 20 per cent, or a present value of \$144,429. This includes only the tangible fixed capital without allowing anything for organization, engineering, or other charges which should be taken into account. An allowance of 15 per cent of the reproduction cost would amount to \$27,080.40, which added to the depreciated value gives the sum of \$171,509. To this should be added current assets, \$46,391. The company claims deficiencies of return in its earlier years which with interest added amounts to \$64,373. Accepting these figures, we have a gross valuation of \$282,273. The income until 1915 ranged from about \$8000 to \$21,000 per annum. In 1916 the income was \$23,759.52; in 1917 it was \$50,134.45. This is more than 17 per cent on the valuation assumed.

It is asserted that the high incomes for 1916 and 1917 were due to large sales for industrial purposes made to the Corning Glass Works and the Steuben Glass Works; that it has become necessary to cut off the supply of gas for industrial purposes, and with that source of revenue taken away the income in 1916 would have been only about \$8200, and in 1917 about \$7000, and that by applying the present rates to the 1917 domestic consumption the gross income would be \$16,893, which certainly would not be excessive.

The Crystal City Gas Company obtains its supply of gas from the Potter Gas Company, a Pennsylvania corporation, which delivers the gas to the Crystal City Company at the city line. There is evidence tending to prove that the Pot-

ter Company, on account of the diminishing supply of gas, required the Crystal City Company to discontinue selling gas for industrial purposes. It is also claimed that the Federal Fuel Administration had also so ordered. The only support for the latter contention is found in a letter signed by the County Fuel Administrator, stating that the Fuel Administration under date of December 13th "issues a ruling that gas for domestic use takes precedence over that for manufacturing and other purposes". It appears that the company continued to supply gas for industrial purposes, except to the two glass works, which it was not supplying at the time of the hearing. In response to inquiries made since the hearing by the Commission to the company, the company informs the Commission that it supplied the Corning Glass Works in the month of May with 5,367,000 cubic feet of gas. It also appears that it proposes to supply gas to a foundry in the town of Corning, where the company also has a franchise. In these circumstances, rates should not be based upon a theoretical discontinuance of the sale of gas to industries. If such sale should actually be discontinued, and permanently, it may well be that the company would be entitled to an increase in rates to domestic consumers. Until such discontinuance actually takes effect, and experience demonstrates the necessity for an increase, no increase should be permitted.

On the hearing, the city amended its complaint by asserting that the old rates were too high. This would seem to be true on the basis of 1917 operations, but that year was the most profitable in the history of the company.

Taking a series of years as a guide, there is no evidence to show that the old rates, which seem to have been satisfactory while in force, are unreasonably high.

The company should be required to cancel its present tariffs and to restore the rates in effect prior to March 1, 1918.

All concur.

In the Matter of Complaints against THE PAVILION NATURAL GAS COMPANY. [Case No. 6304.]

An examination of the records shows that natural gas is very unequally distributed among the customers of the company, and when there is a shortage the greatest good to the greatest number compels a reduction in the amount of gas used by some consumers and that others not in the preferred class shall have their supply discontinued.

Decided July 9, 1918.

Appearances:

, *C. Walter Daggs, Esq.*, attorney, and *Hon. James M. E. O'Grady*, attorney, for The Pavilion Natural Gas Company.

Hon. Arthur E. Sutherland attorney for the Village of Perry.

William F. Huyck, Esq., attorney for the Village of LeRoy.

Hon. James E. Norton attorney for the Village of Warsaw.
A. C. Olp, Esq., attorney for the Village of Mount Morris.
O. C. Lake, Esq., for Ewart and Lake, Groveland, N. Y.
W. P. Randall, Esq., for Clement, McDowell and Pier-
son, and Ewart and Lake.

B. B. Conable, Esq., attorney for the Warsaw-Wilkinson Company.

C. W. Gamble, Esq., attorney for the Village of Moscow.
Hon. Daniel J. Kenefick attorney for the Tri-County Natural Gas Company.

BARHITE, Commissioner:

In case No. 6283, "In the matter of the complaint of the Mayor of Batavia against Alden-Batavia Natural Gas Company as to service," this Commission has expressed its views with regard to the natural gas situation in Western New York. It is not necessary to again state what was said in that case.

Complaint has been made by a number of villages with regard to the service rendered by The Pavilion Natural Gas Company which operates in the counties of Western New York. This company also furnishes to the Tri-County Natural Gas Company the supply of gas furnished by that company to its customers.

An investigation disclosed the same condition which was shown to exist in the Batavia case: the same inability to furnish gas; the same failure on the part of the company to voluntarily take any real and effective steps to increase the supply; and the same want of power on the part of this Commission to order the company to obtain a supply of manufactured gas to be used in times of emergency. Even the courts are powerless until the Legislature so amends the statute as to give the courts or this Commission the power to compel natural gas companies to take the only course which will enable them to furnish a full and adequate supply of the commodity for which they demand and receive pay.

The investigation also shows the unequal distribution of the gas, a distribution which if corrected may inconvenience the few but will give relief and protection to the greatest number of users.

An examination of the record and of the use of gas in five of the largest villages served by The Pavilion Natural Gas Company during one of the winter months of the years 1917-1918 is sufficient to show the unequal distribution of gas.

In Avon, a trifle over 12 per cent of the consumers used over 44 per cent of the gas. Cutting out all industrial users and limiting domestic consumers to 25,000 cubic feet per month would have saved 1,114,000 cubic feet out of 5,218,900 cubic feet furnished, or over 21 per cent. The average use per consumer for the one month was 12,455 cubic feet.

In Warsaw, less than 2 per cent of the customers used nearly 12 per cent of the gas. Shutting off the supply from industrial consumers and limiting domestic consumers to

Vol. VII.

25,000 cubic feet per month would have saved 528,000 cubic feet per month out of 6,735,100 cubic feet furnished, or nearly 8 per cent. The average per customer during the month was 5989 cubic feet.

In Perry, 5 per cent of the customers used over 26 per cent of the gas. Cutting out industrials and limiting domestic consumers to 25,000 cubic feet per month would have saved 1,730,000 cubic feet, or 15 per cent. Average per month for each customer was 8374 cubic feet.

In LeRoy, a trifle over 4 per cent of the customers used over 17 per cent of the gas. Leaving out industrials and limiting domestic consumers to 25,000 cubic feet would have saved 465,000 cubic feet, or 5 per cent of the amount furnished. The average consumption per month was 8180 cubic feet.

In Mount Morris, less than 10 per cent of the customers used practically 50 per cent of the gas. Preventing its use by industrials and limiting domestic consumers to 25,000 cubic feet would have saved about 16 per cent of the gas. The average use of gas was 6320 cubic feet.

The average use per month for the five villages was 8253 cubic feet.

The greatest good to the greatest number can be had under present conditions only by a provision for a more evenly divided supply. If the supply is more nearly adequate to the demand, a more steady pressure can be required and maintained. It is the constant change of pressure which makes serious trouble. A low pressure, if steadily maintained and the burners are adjusted to that pressure, gives more satisfactory results than a higher pressure which drops and then rises, at least so the authorities seem to maintain. A witness asserted that the Pavilion company might increase its supply of gas by changing its method of blowing out its wells. This is a suggestion which should be carefully considered, and adopted if it will lead to better results.

A very serious question is raised by counsel for the Village of Perry to the effect that the Tri-County Natural Gas

Company is entitled to a supply of gas only after the requirements of previous contracts have been fulfilled. This contention is based upon certain clauses in the contract made with the Tri-County company which are as follows:

That the within agreement to sell and deliver natural gas to the party of the second part is made subject to a reservation on the part of the party of the first part of sufficient gas to supply for domestic use the villages of LeRoy and Pavilion, N. Y., and the consumers along the pipe line of said party of the first part, and after five years from date the villages of Perry and Warsaw, N. Y., and all consumers along main line leading thereto shall share pro ratio with Caledonia, N. Y., including all previous contracts and obligations as to furnishing natural gas made by the party of the first part prior to the date of this instrument, and this reservation is made part of this contract, it being understood that there has been no prior contract by the party of the first part for the sale of natural gas for manufacturing purposes, or with companies outside of the villages hereinbefore mentioned.

If because of contract or otherwise first party should by virtue of furnishing gas to other persons other than the villages of Pavilion and LeRoy, N. Y., be unable to supply second party with the maximum amount herein mentioned, then such other parties shall not be furnished until second party has amount required up to the maximum.

It is interesting to note that the contract seeks to protect prior domestic users only, and that the Pavilion company stipulates that it has made no contract for the sale of gas for manufacturing purposes. It would seem that up to the time of making this contract the Pavilion company had not contemplated the use of gas for anything except domestic purposes.

Notwithstanding the terms of the contract in question, it would not be wise to completely shut off the supply of gas from the customers of the Tri-County company. The extreme difficulty which many of the consumers would have in obtaining light, or fuel for cooking under the conditions which now exist in the country, would make their situation one of extreme hardship. The Tri-County company has by previous orders of this Commission been allowed to operate in its assigned territory. The company has no wells of its own and depends entirely upon the Pavilion

Vol. VII.

company for its supply of gas. Certainly no order preventing the Tri-County company from continuing its business should be made until the interested parties have had an opportunity to present fully to the Commission their views or a proceeding has been brought solely for that purpose.

The contention of counsel for the Pavilion company that this Commission has no jurisdiction to afford any relief is negatived by the provisions of sections 65 and 66 of the Public Service Commissions Law.

All concur.

188 PUBLIC SERVICE COMMISSION, SECOND DISTRICT
P.S.C. 2d D.

In the Matter of the Complaint of the TOWN OF HARMONY,
Chautauqua county, against ERIE RAILROAD COMPANY
as to repair of certain bridges carrying highways over its
railroad. [Case No. 6432.]

1. Where by virtue of an order of the Board of Railroad Commissioners made pursuant to statute, a grade crossing has been abolished by carrying a public highway over the railroad on a steel frame bridge constructed of steel side girders connected by transverse steel beams about fourteen feet apart riveted to the girders, and supporting wooden joists about fourteen feet in length which run from beam to beam, which in turn support plank flooring which forms the surface of the roadway, *held*, that such wooden joists are not a part of the framework of the bridge, but are to be considered a part of the roadway and therefore to be maintained by the municipality as provided in section 93 of the Railroad Law.

2. Where a grade crossing elimination under the statute has been completed, the highway being carried over the railroad on a viaduct, and the town authorities petition the Public Service Commission for an alteration in the existing structure, the only authority upon which the Commission can direct such alteration is found in section 91 of the Railroad Law, which prescribes that public safety must be shown to require the proposed alteration. Accordingly *held*, that where the petition fails to allege or disclose, and no proof is offered or claim made, that public safety requires the alteration prayed for, the petition should be dismissed.

Decided July 11, 1918.

Appearances:

Ottoway & Munson of counsel; *C. Abbott*, Highway Commissioner; and *A. L. Richardson*, Justice of the Peace, for the Town of Harmony, complainant.

M. B. Pierce for respondent.

HILL, Chairman:

On October 30, 1906, an order was made by the then Board of Railroad Commissioners, pursuant to the then section 60 of the Railroad Law, determining the manner in

which the Nypano Railroad (now the Erie Railroad, respondent herein) should cross two certain highways in Chautauqua county, as follows:

Exhibit E, Town of Harmony: Highway from Watts Flats to Blockville, at station 820 plus 58.9 of center line of changed route of Nypano Railroad.

The highway on its present line shall be carried over the railroad on a steel bridge at a point shown on a plan dated June 28, 1906, and marked Exhibit E, now on file with this Board in this matter. This plan has been changed since it was first drawn, the change being shown thereon, but it is not marked "Alternate Plan". The bridge shall be eighteen feet wide between guard-rails. The bridge shall have a wooden floor. The clearance of the bridge above top of rail of the railroad shall be twenty-two feet. The maximum grade on the approaches to the bridge shall be eight per cent. The roadbed of the approaches to the bridge shall be twenty-four feet wide and shall have guard-rails where the embankment is higher than three feet. The representatives of the town expressed themselves at this hearing as satisfied with this proposed over-crossing as thus proposed to be constructed.

Exhibit A, Town of Harmony: Highway from Grants to Lottsville, at station 636 plus 40 of center line of said branch connection or cut-off.

The highway shall be changed in location and shall be carried over the railroad at a point shown on a plan dated April 20, 1906, and marked Exhibit A, now on file with this Board in this matter, on a steel bridge sixteen feet wide between guard-rails, which guard-rails shall be of planking two feet high, the bridge to have a clearance of twenty-two feet above top of rail of the railroad. The bridge shall have a wooden floor. The maximum grade on the approaches to the bridge shall be eight per cent. The roadbed of the approaches to the bridge shall be twenty-four feet wide and shall have guard-rails where the embankment is higher than three feet. A piece of existing highway shall be abandoned and a new piece of highway shall be constructed in accordance with said plan, Exhibit A, dated April 20, 1906. The representatives of the town expressed themselves at this hearing as satisfied with this proposed over-crossing as thus proposed to be constructed.

Following the granting of the said order, the bridges in question were constructed upon plans which called for a steel framework resting on stone abutments, with steel girders, one on each side, running lengthwise of the bridge, to which

were riveted steel cross-beams running transversely to the girders about fourteen feet apart. This construction comprised the steel framework of the bridges, but in order to furnish the bridges with floors so as to permit them to be used for traffic, wooden joists three by twelve inches were laid from cross-beam to cross-beam parallel with the side girders, and a three-inch plank surface, the planks running from side to side of the bridge, was laid on top of the joists. This construction was in conformity with the plans which were made for the bridges and approved by the Railroad Commissioners. The two bridges were completed in the Winter of 1906-1907. On March 14, 1908, the Highway Commissioners of the Town of Harmony formally petitioned the Public Service Commission (which had succeeded to the powers and duties of the Board of Railroad Commissioners) that the order of the Board of Railroad Commissioners be modified so as to read "that the highway shall be carried over the railroad on a steel bridge with steel eye-beams or stringers and that the floor shall be of cement, and that the maximum grade on the approaches to the bridge shall be five per cent". Upon hearing, and on respondent's motion, this proceeding was discontinued without any modification of the order being made. In May, 1911, the Commission, after inspection, adopted a resolution approving the completed work.

The complaint or petition in this proceeding, after setting forth the provisions of the original order, alleges that in each instance the railroad company neglected to construct a steel bridge in all its parts, in that it did not place steel stringers or joists to support the wooden floor provided for by the said order, and that in place thereof the said railroad company constructed the said bridge with wooden stringers or joists, and in that particular it did not comply with the said order.

Inasmuch as the bridges were constructed in accordance with the plans adopted by the Board of Railroad Commissioners, and the construction was approved by the Board

after their completion, it is difficult to discover any hypothesis upon which the said order can be opened and its conditions changed. We must therefore assume that the bridges were constructed in all respects in conformity with the orders which authorized, directed, and approved their construction.

The complaint further alleges in each instance "that the said wooden joists have become so decayed and rotten that they are not of sufficient strength to take a new floor over the said bridge, that the petitioner desires at once to construct a new roadway over the said bridge, that the said railroad company has declined and refused to replace or repair the said joists, and that the complainant should not in justice and right under law or equity be to the expense of replacing said joists".

The truth of this allegation, so far as the facts are concerned, is admitted by the respondent, and squarely presents the question whether the wooden joists are a part of the "framework," or on the contrary form part of the "roadway," of the bridge within the meaning of section 93 of the Railroad Law, which provides that "when the highway crosses a railroad by an overhead bridge the framework of the bridge and its abutments shall be maintained and kept in order by the railroad company, and the roadway thereover and the approaches thereto shall be maintained and kept in repair by the municipality".

There is very little authority to be found bearing upon the question in dispute, but such as we find would seem to bear out the respondent's contention. While dictionary definitions are never controlling in statutory construction, they are entitled to some weight as bearing upon the meaning of words which are made use of in statutes. The dictionary definitions of frame and framework all seem to be in substantial agreement that a frame or framework defines the supporting or enclosing frame which is used as the basis for a more complete structure, or as those parts which may be called the skeleton in the sense that the bones are the frame of the body. Other definitions refer to the framework as

the constitution, the system; also as the sustaining parts of a structure fitted and joined together.

The complainant cites the case of *Sullivan et al. Selectmen vs. Boston and Albany Railroad*, Supreme Judicial Court of Massachusetts, Suffolk, Nov. 6, 1911, reported 96 N. E. 347, where the statute provided that the framework of the bridge and its abutments "shall be maintained and kept in repair by the railroad corporation, and the *surface* of the bridge and its approaches shall be maintained and kept in repair by the city or town". This statute is in substance the counterpart of the New York statute except that the word "surface" is used where our statute contains the word "roadway". In the Massachusetts case, the roadway of the bridge consisted of three inches of hardwood planking laid on the steel framework, covered by a surface of two-inch pine planks, which became the wearing surface for traffic; the court held that the word surface as used in that statute applied to both layers of planking. This case I consider very strong authority against the complainant's proposition, because it would seem entirely fair to compare the three-inch hardwood planking supporting the two-inch wearing surface plank, with the wooden joists which support the surface planks in the case under consideration. The word roadway is certainly more comprehensive than the word surface. In every roadway constructed with any degree of thoroughness there will always be found a supporting structure below the surface and invisible to the eye. This is true for instance of granolithic walks, of asphalt pavements, stone pavements, brick pavements, and macadam pavements. While the question may not be free from doubt, I am inclined to hold that the joists must be considered a part of the roadway and not a part of the framework of the bridge; and as the construction is substantially similar in both bridges, the same conclusion applies to both.

The complaint further alleges that the complainant "is desirous of making an improvement of the roadway over and across the two said bridges by constructing a concrete floor in place of a wood floor or roadway, and is desirous

that the said railroad company should replace the joists of a sufficient strength and manner to carry a concrete roadway over said bridges"; and a part of the prayer for relief is for an order directing the railroad company to repair immediately the framework of said bridges with new joists of steel, and of sufficient strength and so constructed and placed as to carry a new concrete floor.

We can find no authority in the statutes for the making of such an order by the Commission. A grade crossing elimination structure which has already been completed under the statute in question can be altered by the Public Service Commission only where a petition is presented to it alleging that public safety requires the alteration, or where the Commission proceeds of its own motion on the opinion of the Commission itself that public safety requires such an alteration. The former procedure is prescribed by section 91 of the Railroad Law, and the latter procedure by section 95. Inasmuch as the complaint fails to allege, and it is not claimed as a fact, that public safety requires the alteration, the petition can not be entertained as having been made under section 91, and the complainant does not claim to be proceeding under that section. As that section contains the only provision of authority to the Commission to order the alteration of a completed structure on a complaint of the town authorities, it follows that the complaint must be dismissed.

All concur.

Petition of THE FISHKILL ELECTRIC RAILWAY COMPANY under subdivision 1, section 49, Public Service Commissions Law, for permission to increase passenger fares. [Case No. 6079.]

Decided July 25, 1918.

Appearances:

James G. Meyer, Beacon, N. Y., attorney, and J. T. Smith, president, for the petitioner.

CHEENEY, Commissioner:

The petition in this case, which is in the nature of a complaint, alleges that the rates, fares, and charges charged by the petitioner are insufficient to yield a reasonable compensation for the service rendered, and are unjustly and unreasonably low, and do not allow a reasonable average return upon the value of the property actually used in the public service after providing for surplus and contingencies; and asks that notwithstanding section 181 of the Railroad Law, the Commission determine the just and reasonable rates, fares, and charges to be observed and in force, and permit an increase in the rate of fare charged by the petitioner in the cities and incorporated villages in which it operates, from five cents to six cents. It appears that there are no conditions in any of the municipal consents under which the company operates, fixing the rate of fare it may charge, or limiting the power of this Commission to fix reasonable rates of fare notwithstanding the provisions of section 181 of the Railroad Law. No opposition to the application was presented at the hearing, and the municipal authorities of the City of Beacon have written the Commission that they have no protest to make in the matter but leave it entirely to the judgment of the Commission.

The petitioner operates an electric railroad from the New York Central depot in the city of Beacon to the village of Fishkill, with a branch extending to the foot of Mount Beacon. The road is operated with two fare zones at ~~five~~

cents each: the first comprising the city of Beacon and extending toward Fishkill about three miles to the Glenham switch, and the other the balance of the road, about six miles. It is proposed to increase the fare in each of these zones to six cents. The portion of the road extending from the railroad station in Beacon to the foot of Mount Beacon and a large portion of the equipment are the property of the Citizens Railroad, Light and Power Company, and are operated by the petitioner under a lease at an annual rental.

It appears that the total revenue of the road for the year 1917 was \$57,331.15, the total operating expenses \$46,818.74, and taxes \$2091.45, leaving a balance of \$8420.96 applicable to return on invested capital. The interest on the bonded debt amounted to \$3000, other interest \$27.01, and the rental paid under the lease to the Citizens Railroad, Light and Power Company \$9000, leaving an actual deficit in operation for the year of \$3606.05. In arriving at these figures there was charged to operation for depreciation reserve only the sum of \$3639.67, a sum which in the opinion of the Commission is much too small and much less than the sums recommended by the Commission in its Uniform System of Accounts for Street Railroad Corporations. The company submits figures of its income account for the year 1917 in which the charge for depreciation reserve, or amortization as it terms it, is placed at \$8196.19, instead of \$3639.67, the sum actually appearing on the books. This "corrected figure," as it is termed, is arrived at by computing the reserve on the different items of depreciable property according to the percentage of their probable life, details of which are given, resulting in an average of 3.07 per cent of the cost of such property, a method which it claims corresponds with that recommended by the Commission. Computed on this basis, the sum applicable to capital return, including fixed charges, is \$3864.44, and a net corporate loss, after the payment of interest and rental under the lease, of \$8162.57 is shown. The books of the corporation show a net corporate income over opera-

ting expenses for a ten year period ended December 31, 1917, of but \$8468.36, and in none of these years have the amounts charged to the depreciation reserve been adequate. These figures, when tested by any of the rules which form the basis of rate making, demonstrate that the present rates are inadequate and that the petitioner is entitled to an increase in rates.

No valuation of the property of either of these companies was ever made by or under the direction of this Commission. Petitioner presents here an appraisal of the property and equipment operated by it, made in 1915 by an engineer in the employ of J. G. White and Company and the manager of the Poughkeepsie and Wappingers Falls Railway Company, which makes the value of the total physical property \$259,044, non-physical expenditures during construction \$38,856.60, or a total construction value of \$297,900.60. The proof of the actual expenditure for capital items since that time as shown by the books of the company brings the total capital balance at the beginning of 1917 to \$303,868.88, and at the end of the year \$315,329.91, or an average of \$309,599 for the year. These figures do not coincide with the capital items contained in the company's books or the annual reports on file with this Commission, but it is evident from an examination that the figures contained in the books and reports are practically only nominal. As a comparison of the amounts stated in this appraisal with similar amounts in reports of other electric railroads of substantially similar mileage and equipment on file with the Commission does not show any great inequalities, it is fair to assume that the appraisal is a fair statement of the value of the property used by the petitioner in furnishing service, no allowance being made therein for organization expenses or other intangibles which might properly be taken into consideration.

Claim is also made for an allowance for working capital, but for the reason that the accounts of this company are so mixed with those of the Citizens Railroad, Light and Power

Vol. VII.

Company, and no effort was made to separate them, the evidence offered is purely an estimate; and as the results of operation and the probable effect upon the revenue of the increase asked for show that an adequate return in all probability will not be realized upon the capital invested as computed above, it is hardly worth while to follow this inquiry further.

The same may also be said of the claim for deferred return on investment. It appears that practically no dividends have been paid to the stockholders of this road since its inception, and no return of any kind has been made upon the capital invested except the interest which has been paid upon the bonded indebtedness, which is only \$50,000, and the rental of \$9000 per year under the Citizens Railroad, Light and Power Company's lease. Computations have been presented covering the last ten years' operations based upon an 8 per cent return upon the value of the physical property adjusted from the books to the appraisal made in 1915 plus the working capital as estimated, which show an accumulated deficiency in return for that period of \$144,857.93, and we are asked to include that item as "going cost" in fixing the valuation of the property for rate purposes. We do not consider it necessary to decide that question in order to determine the present application, and will leave it open for consideration should occasion arise in the future when the abnormal conditions under which the road is now being operated shall have ceased to exist.

It is evident that if this proposed increase is granted the probable income to be realized from the operation of the road will not be such as to provide an undue return upon the capital invested as computed above. Certain computations of future income have been made by the Commission's accounting department upon the basis of several assumptions. While these are estimates only, as must necessarily be the case with regard to probable future operations, they are worthy of consideration. Upon the assumption that

the traffic and the operating expenses and taxes remain unchanged from those of 1917, there would be produced a gross income available for return on invested capital of \$14,757.43, which would give a rate of return of 4.8 per cent upon the estimated cost of physical property, not including working capital. If the other items of capital account claimed by the petitioner were taken into consideration, the rate of return would be correspondingly decreased.

It has been shown by the experience of other companies where rate increases have been granted that there is to some extent a falling off in traffic and that the gross income derived is less than the proportionate increase in rate. It also appears that the expense of operation of this company has increased and will, in all probability, still further increase on account of higher prices for labor and all materials necessary for operation. Assuming a 5 per cent decrease in traffic and a 10 per cent increase in operating expenses, the amount available for capital return would be \$6098.90, and the rate of return on the same estimate of capital 2 per cent. Further decreases in traffic and increases in operating expenses still further decrease the rate of return until it would soon reach the vanishing point which would mean a deficiency in operating expenses and ultimate bankruptcy.

While the increase of fare asked for will probably not permit of any dividends to stockholders, it should be granted, and although the method by which the determination is arrived at can hardly be said to be strictly scientific, it will probably afford temporary relief and permit this road to continue to serve the public in these abnormal times, and, when business conditions have adjusted themselves, another effort might be made to rearrange the fare schedule more in accordance with the principle of "a reasonable average return on the value of the property actually used in the public service and the necessity of making reservation out of income for surplus and contingencies".

All concur except Commissioner Barthite not present.

In the Matter of the Complaint of THE H. H. FRANKLIN MANUFACTURING COMPANY of Syracuse *against* NEW YORK TELEPHONE COMPANY as to certain charges for telephone service. [Case No. 6407.]

Telephone companies should be allowed reasonable latitude to adopt and enforce such regulations as will permit them to render reasonable and efficient service to the public generally.

The fact that a certain form of service and equipment has been in use, which is satisfactory to certain subscribers who object to a change, should not be allowed to prevent the company making a change and discontinuing such service and equipment when it is convinced in the exercise of good judgment and ordinary business foresight that different equipment and different form of service will enable it to render more efficient service to the general public.

The foregoing rule applied in the determination of the complaint against a change in practice and equipment regulating night service to private branch exchange subscribers.

Decided August 8, 1918.

Appearances:

Decker, Smith & Curtis (by Mr. Decker and Mr. Smith), First National Bank building, Syracuse, N. Y., for complainant.

Paul H. Burns, 15 Dey street, New York city, for respondent.

CHENEY, Commissioner:

This complaint was filed against a change in practice of the New York Telephone Company in regard to night service and night listings in the telephone directory of the private branch exchange maintained by complainant at its manufacturing plant at Syracuse, and incidentally it involved a complaint against the rates charged for such service, according to the schedule of tariffs in force and on file with the Commission.

200 PUBLIC SERVICE COMMISSION, SECOND DISTRICT

P.S.C. 2d D.

The New York Telephone Company is the Bell Company operating in the State of New York, its territory including the whole State and a part of New Jersey. It was formed by the consolidation of a number of different companies operating in different parts of the State, the company operating the Syracuse territory being the Central New York Telephone and Telegraph Company. The complainant is a large manufacturing concern whose telephone service was first furnished by the Central New York Company, and after the consolidation the service was continued by the New York Company. The equipment used by complainant consists of a private branch exchange, consisting of a switchboard connected with the central office by five trunk lines, and numerous extensions from the branch exchange switchboard to various parts of complainant's establishment. This private branch exchange was attended by an operator employed by complainant, who was on duty from 7:45 a. m. to 5:30 p. m., and during the balance of the time the switchboard was unattended. In order to permit of night service it was the practice of complainant's operator before leaving at night to connect certain of the extensions with the different trunks, corresponding with the listings as given below, the effect being that such extension with its connecting trunk could be operated as a single telephone, all other extensions being out of service. Complainant had a listing in the directory of the Central New York Company as follows:

Franklin Mfg. Co., The H. H., 302 S. Geddes.....	Warren 2540
<i>Note: Week days after 5 p. m., Sundays, and holidays call by individual number.</i>	
Main office	Warren 2540
Repair shop	Warren 2541
Shipping room and engine room.....	Warren 2542
Watchman's lodge	Warren 2543

The subscriber's listing in a telephone directory corresponds with the hole or position on the switchboard in the central office which constitutes the termination of the wire leading to the subscriber's telephone, and when a call comes in, the number is the distinguishing feature which enables

the switchboard operator to complete the connection desired. When a private branch exchange subscriber has more than one trunk line, each one terminates in a numbered hole on the switchboard, but only one of the numbers is listed in the directory. In order to assure accuracy of operation it is desirable that these trunks end in consecutively numbered holes, but owing to the fact that subscribers take on additional trunks from time to time as the exigencies of their business demand, this is not always possible, as the consecutively numbered holes may be already in use for other subscribers when so required. For the same reason it frequently happens that the listed number is not the first of the consecutive numbers. For the information of the operator the different trunks of a subscriber are indicated by a connecting line, either white or red, underlining the respective holes. As the object of the additional trunks is to permit more than one call to be completed at the same time, the evidence is that the method of handling calls, according to the instructions and practice now and always in use by the New York Company, is that when a call comes in, the operator shall test the number called, and if that line is not in use complete the call upon that line; if the called line is found to be busy the operator will test the remaining lines of the series, as indicated by the underlining, until one is found which is not busy, and complete the call in that; if all are found busy the operator so reports.

The company claims, and there is no evidence to the contrary, that when it took over the Central New York Company it found in use there the form of directory listing for night service above mentioned, which was not used in other places in its territory, and which in the opinion of its engineers and executives was not a desirable practice, one which in effect was an undertaking on the part of the company to give a service which was beyond its power, and which resulted in confusion in operation and dissatisfaction on the part of its subscribers. The company took up the study of

this problem among many others affecting the quality of service rendered, and worked out a plan for night service on private branch exchange systems which is contained in its schedule of tariffs now on file with the Commission, and which is now in force in this State. The plan was not perfected all at once, the first tariff being filed March 1, 1915, and successive supplements containing changes December 31, 1915, September 1, 1916, and October 2, 1916, the two latter being the ones in force at the time of filing this complaint. The tariff contains two optional plans available to the complainant. Plan No. 1 provides for handling incoming calls at night on the same basis as during the day. Under this plan each extension station which is to receive night service will be connected with a specified trunk at the private branch exchange switchboard, but only one trunk line in the same underlined series will be listed in the directory. This would give precisely the same service as the complainant had under the old system, except the added directory listings, and at no extra expense. The reasons assigned by the company for the withholding of the privilege of extra listings are two. One, that the publishing of the night listings (which would be the different departments with the consecutive numbers of the trunks in the series with which they are connected) would be in effect a representation by the company that it would connect the caller with the particular department desired and no other, a promise which it could not perform, because on account of the large number of private branch exchanges in its different systems, especially in the large cities, and the irregularity of the hours during which they are attended, it would be humanly impossible for the central office operators to remember when to follow one system or another in answering calls from each, rendering it necessary that but one method, and that the day method, should be used. The other reason is that experience has shown that when extra listings are permitted subscribers take advantage and use the directory

as an advertising medium by requiring large numbers of unnecessary extra listings, thereby increasing the bulk of the directory, especially in the large cities. The company claims that the object of a telephone directory is to furnish a list of subscribers for use in obtaining connections, and that all unnecessary matter should be eliminated therefrom, and its use for advertising purposes, even if compensated, is entirely unwarranted. This first plan is the one chosen by about 80 per cent of the private branch exchange subscribers.

The other plan was designed to fill the want which experience has shown exists in comparatively few cases of a sure night service advertised to all users. This plan is stated in the filed tariff in these words: "Under this form of service a trunk which is connected through an extension at night may be bridged to a multiple jack bearing a different (non-consecutive) number. The regular number in the underlined series may then be used for day service, and the special (non-consecutive) number for night service, and so shown in the directory. In this way a call made at night for the special number will be completed only by the specific trunk to which it is bridged; if that trunk is busy, or does not answer, the calling party will be so informed, instead of being connected with some other trunk in the service." That means that each trunk so bridged has two termini on the switchboard, one in the underlined series and another with a non-consecutive number. During day operation the series terminus is used, and at night the other one; the effect being that the trunk, properly connected with the proper extension in the subscriber's series, and the non-consecutive terminus on the central switchboard which has a listing in the directory, are operated precisely as a separate telephone for night service. For this special service an additional rate is charged.

It appears that some time after the perfection of the new plan and the filing of the tariff regulating it, the company took up the matter of readjusting the private branch

204 PUBLIC SERVICE COMMISSION, SECOND DISTRICT

P.S.C. 2d D.

exchange business in Syracuse with the new plan and schedule. It then had 19 such subscribers. Seven have changed to the multiple jack system provided by Plan 2, and 4 new subscribers on that system have been added since. Ten have discontinued the night listing, probably using Plan No. 1, and two: the City of Syracuse and the Canal office, a State Department, still have the old form of listing. The company claims that no discrimination is shown as those two subscribers come within the exception contained in section 92, subdivision 3, of the Public Service Commissions Law.

Complainant has refused to elect to take Plan 2, and it is not satisfied to use Plan 1, and has put in use a method by which all its extensions which it desires for night use are connected with the listed trunk, the result being that a call for the Franklin Company rings the bell at every extension, and all the other trunks are idle. This form of night service is not provided for in the tariff or practice of the company, and is not recognized by it. What the complainant really wants is the service afforded by Plan 1, and in addition the listing of the connected consecutive trunks without any extra charge, a service which is not provided for by the tariff filed, and which, if given to complainant alone, would be discriminatory. The real question therefore is: Is the new regulation adopted by the company for night service or private branch exchange lines, which discontinues the method of operating and listing which was formerly in use in the Syracuse district, a reasonable one?

The rule is well settled as announced by both courts and commissions, that a telephone company should be allowed reasonable latitude to adopt and enforce such regulations as will permit it to render reasonable and efficient service, and the fact that a certain form of service and equipment has been in use, which is satisfactory to certain subscribers who object to a change, should not be allowed to prevent the company making a change, and discontinuing such service

and equipment when it is convinced in the exercise of good judgment and ordinary business foresight that different equipment and a different form of service will enable it to render a more efficient service to the general public. (*Murray vs. N. Y. Tel. Co.*, 170 App. Div., 17; *Citizens Coal Co. vs. Mountain States Tel. Co.*, P. U. R. 1917 F, 822; *Re Lincoln Tel. & Telegr. Co.*, P. U. R. 1915 D, 803).

There is nothing that appears in this case which tends to show that the regulations in question are unreasonable. The only difference between the service furnished by Plan 1 and that which complainant formerly enjoyed, and which has been discontinued, is the listing of the different departments. The reasons given for the discontinuance of this appear to be quite reasonable and are the result of much study. Complainant's objection to the use of this plan is that no notice is given to those desiring to call the company, of the number of the different department desired. As was pointed out, this objection can be largely overcome by coöperation on the part of complainant itself, and good service of a telephone utility depends in a large measure upon the coöperation of the calling and called parties. If the trunk bearing the listed number be assigned to the extension most likely to be called, and the person answering there be instructed to give the proper number to call when any other department is desired, it would appear that fairly efficient service would be afforded, especially in view of the fact that comparatively few incoming night calls are received, an actual count of the incoming calls for a whole week's operation showing but 29. In addition, employees of the company and others from whom night calls could reasonably be expected could with but little trouble be furnished by complainant with the night listing.

If complainant finds that the night calls are sufficient in number and importance, that it is desirable that they be routed accurately and quickly, although not enough to require a night operator upon its switchboard, it may

^

206 PUBLIC SERVICE COMMISSION, SECOND DISTRICT
P.S.C. 2d D.

obtain this extra service by the use of Plan 2, but as that requires extra equipment and extra listing, it is only fair that it should pay an extra charge for the extra service.

The only remaining question is whether the rates charged for Plan 2 operation are reasonable. With complainant's present equipment these rates would be: 4 special multiple jacks \$6 each, \$24; and note in directory giving hours of service \$6, or a total of \$30. The extra listings giving the numbers of the different departments would in this case not call for an extra charge, because of the extra listings which it is entitled to because of the number of trunks in use. The evidence of the company, which is not contradicted, is that these charges are less than the actual cost of the service. We can not, therefore, say that the rate charged for this service is unreasonable.

When the complainant finished its proof a motion was made to dismiss on the ground that the complainant had not sustained the burden of proof which rests upon it under the decisions of the courts of this State, which are to the effect that in cases before the Commission the burden of proof is upon the complainant to show that the rates are unjust and unreasonable. *People ex rel. N. Y. C. R. R. Co. vs. Public Service Commission*, 215 N. Y., 241. As pointed out in that case this rule affects the burden of proof and not the order of proof; and the Commission prefers if possible in the case of every complaint, to bring out all the facts connected with it, and then decide the case upon the merits, having regard of course to the rule as to the burden of proof, rather than to be too technical as to the order of proof, thereby dismissing a complaint while leaving the whole question open, undertermined. It follows that the complaint should be dismissed.

All concur.

Petition of UNITED TRACTION COMPANY under section 49, Public Service Commissions Law, for permission to increase passenger fares. [Case No. 6098.]

In the Matter of a schedule of passenger fares filed by the UNITED TRACTION COMPANY with this Commission May 2, 1918. [Case No. 6444.]

In the Matter of the Complaint of JOHN H. MCINTYRE, individually and as Mayor of and on behalf of the residents of the City of Rensselaer, *against* UNITED TRACTION COMPANY as to proposed 6-cents fare between Rensselaer and Albany with no transfer in Albany. [Case No. 6462.]

1. The so called Barnes Act, laws of 1905, chapter 358, fixing a rate of street car fare in the city of Rensselaer, and between the cities of Rensselaer and Albany, superseded rates previously fixed by franchise and contract by the City of Rensselaer and its predecessor, the Village of Greenbush. The statutory rate so fixed may be superseded by the Commission by virtue of section 49, subdivision 1, of the Public Service Commissions Law if the facts so demand.

2. What a corporation is entitled to in the way of return is not necessarily enough to pay dividends or even to pay interest. It is entitled to a fair return on the value of the property used and useful in the public service.

3. If a street railroad corporation operates in two communities as a result of merger, consolidation, or reorganization of previously existing local lines in each community, the fact that there are underlying bonds of the original corporations greater in one community than in the other does not justify in itself a difference in rates. The question is as to the value of the property and not as to the manner in which money for its acquisition was procured.

4. The affairs of the United Traction Company, operating a street railroad system in the cities of Albany, Rensselaer, Troy, Cohoes, and Watervliet, the village of Green Island, and the town of Colonie, examined, and they were held to show that the corporation is not earning and can not, under existing conditions, earn at present rates of fare an adequate return on the value of its property used in the public service.

5. The case presenting an emergency, no actual appraisal of the property of the company was undertaken. Upon evidence as to the

205 PUBLIC SERVICE COMMISSION, SECOND DISTRICT

P.S.C. 2d D.

extent of the system and general evidence as to the property owned, and upon comparisons made with other street railroad corporations within the State, it was assumed that the property is worth at least a sum equivalent to its funded indebtedness amounting to about \$58,000 per mile.

6. In estimating a prospective income account it was found that the company had been expending in recent years large sums to meet deferred maintenance, and had not been setting aside an adequate depreciation reserve. Its proper maintenance charges were therefore calculated upon the average of such expenses for eight of the larger systems within the Second Public Service Commission's district, the conditions of which were deemed fairly comparable. An allowance was made for a depreciation reserve equal to the minimum advised by the Commission for general use.

7. The communities involved, with the exception of the cities of Albany and Rensselaer, while politically independent, are contiguous and constitute, industrially and socially, a single community, and the travel is very largely from one to another. While section 181 of the Railroad Law makes the municipality the unit for rate purposes it was impossible exactly to apportion expenses among the several communities, but it was evident that conditions did not vary materially and that none taken alone would show an adequate return. Therefore, this group of communities was taken to constitute a single fare zone with a uniform rate of 6 cents throughout with transfer privilege.

8. The cities of Albany and Rensselaer are likewise situated and a single rate of 6 cents was provided for including both those cities with like transfer privileges.

9. While the operation in the Albany-Rensselaer zone has evidently been less unprofitable than that in the Troy zone it was found that there is no such difference as to warrant a difference in rates.

10. On the interurban line between the Troy and Albany zone a through rate of 12 cents was authorized with transfer privileges to local lines in each zone.

Decided August 13, 1918.

Appearances:

H. T. Newcomb, New York city, and *John E. MacLean*, for the company.

James R. Watt, Mayor, and *Arthur L. Andrews*, Corporation Counsel, for the City of Albany; *Edmund N. Huyck*,

Vol. VII.

President, *Edward T. Coffin*, Secretary, *William E. Woppard*, *Peter G. TenEyck* for the Albany Chamber of Commerce; *W. E. Drislane*, Albany, N. Y., in person.

Cornelius F. Burns, Mayor, *Thomas H. Guy*, Corporation Counsel, and *John P. Judge*, Assistant Corporation Counsel, for the City of Troy; *John J. Ryan*, Acting President, and *E. L. McColgin*, Secretary, for the Troy Chamber of Commerce; *John T. Starkweather*, representing Troy Development Corporation.

James F. Brearton in person, and *Owen D. Connolly* in person.

Ernest L. Boothby, Corporation Counsel, for City of Rensselaer; *John J. Sullivan*, President of the Board of Trade, Rensselaer, N. Y.; *L. D. C. Woodward*, President, Rensselaer Chamber of Commerce; *William B. Alstein*, *Chester Moore*, and *John W. Kenny*, Rensselaer, N. Y., in person.

Edwin W. Joslin, Mayor, and *Chester Wood*, Corporation Counsel, for the City of Watervliet.

M. J. Foley, Mayor, and *D. S. Dawson*, Corporation Counsel, for the City of Cohoes; *John T. Gorman*, Cohoes, N. Y., in person.

Frank H. Deal, attorney for the Village of Green Island; *S. N. Hutchinson*, President, Chamber of Commerce, Green Island.

William A. Mellen, assistant manager transportation division, Bureau Industrial Housing and Transportation, Washington, D. C.

R. J. Lemmon, representing Federal Housing Department at the Watervliet Arsenal; *W. A. McClatchy*, Watervliet Arsenal, representing the United States Government.

LEVINE, Commissioner:

The first of these cases is a complaint under section 49 of the Public Service Commissions Law, wherein the United Traction Company alleges that its revenues are insufficient

to yield a fair return on the value of its property used in the public service and asks in effect that the rate be fixed at 6 cents wherever the charge is now 5 cents with a certain additional request for charges for transfers and double fares between twelve midnight and 5 a. m. These additional requests were abandoned upon the hearing. The second case resulted from the filing, while the first application was pending, of tariffs creating in effect a zone system, and establishing additional fares to passengers riding from one municipality to another. These tariffs are under suspension by the Commission pending an investigation of the entire matter. The third case is a complaint of the Mayor of the City of Rensselaer against a proposed 6-cent rate between the cities of Rensselaer and Albany without transfers. The filing of the tariffs establishing a zone system it is understood was due to the decision of the Court of Appeals *In the Matter of Quinby vs. Public Service Commission*, 223 N. Y., 244, holding in effect that the Legislature has not delegated to the Public Service Commission, Second District, authority to establish or permit rates for a street railroad beyond those fixed as conditions of the consent of municipal authorities to the construction and operation of the railroad in the streets of the municipality. Such restrictions were imposed by some of the municipalities concerned. They have now been removed so far as the purposes of the present case are concerned by action of the municipal authorities, except perhaps in the case of the City of Rensselaer. It is said that there were certain franchises granted by the Village of Greenbush, later incorporated into the present city, and by the city itself to the United Traction Company or its predecessors, and containing certain rate restrictions. One at least of these is not in conflict with the tariffs now proposed. It is not necessary to examine these particularly, and in fact we probably have not all of them before us. The so called Barnes Act, laws of 1905, chapter 358, was later than these franchises and undertook to fix the

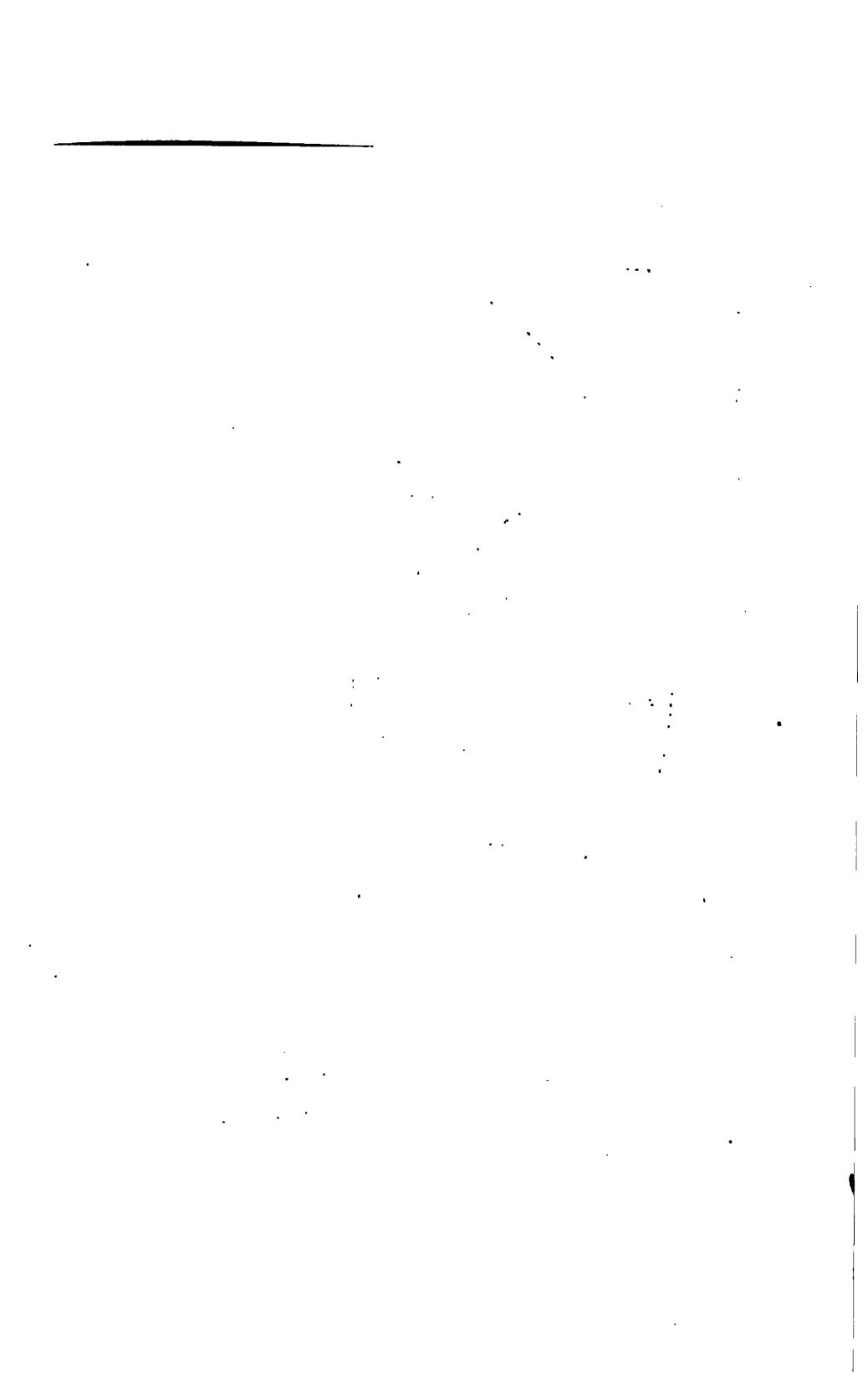
rate of fare in Rensselaer, and between Rensselaer and Albany. This statute is referred to in the following paragraph. *In People vs. Public Service Commission*, 143 A. D., 769, the Appellate Division in effect held that the police power of the Legislature in such matters is superior to and supersedes such municipal action. The City of Rensselaer, in the pending case about to be stated, seems to assume that the Barnes Act supersedes the franchise restrictions, and counsel for the United Traction Company takes the same position. In this view the Commission concurs. The Commission is therefore permitted to proceed under the general provisions of law with the original case, and in view of the conclusion reached on the application to charge 6 cents where 5 cents has heretofore been the rate, it is unnecessary to consider the tariffs under suspension, and an order will be made directing their cancellation.

The complaint of the Mayor of Rensselaer was based upon the theory that the Barnes Law of 1905, chapter 358, restricts the rate of fare to 5 cents with transfer privileges for a continuous ride in and between the cities of Albany and Rensselaer. This was long ago the subject of a complaint before the Commission [case No. 619], decided November, 1910, the Commission holding that the 5-cent rate with transfers was the lawful rate. This decision was confirmed by the Appellate Division 143 A. D., 769, affirmed by the Court of Appeals 202 N. Y., 547. In denying the application for rehearing the Commission stated that if the rate of 5 cents in time proved unprofitable application might be made for an increase. The Quinby case holds that under proper conditions the Commission has such authority to supersede statutory rates. This relegates the question as to the sufficiency of the 5-cent fare to the consideration of the general case first above named, and the company's action in proposing to continue to permit transfers eliminates the objection based on the previous proposal to withhold them.

The affairs of the United Traction Company have been

so often before the Commission that it seems supererogatory to enter upon any particular description of its history and operations. *In the Matter of the United Traction Company's Proposed New Passenger Fares and Charges, etc.*, [case No. 5363] decided June 26, 1916, V Public Service Commission Reports, p. 287; *In the Matter of the United Traction Company's Proposed New Passenger Fares and Charges, etc.* [case No. 5772] decided February 20, 1917, VI Public Service Commission Reports, p. 70, and several prior orders. However, in order that this opinion may be reasonably complete within itself it should be stated that the United Traction Company, like many other similar systems, is the result of reorganizations, mergers, and consolidations by which a group of street railroads in what is commonly called the Capitol District was brought together under this corporation which now operates the street railroad system in the cities of Albany, Rensselaer, Troy, Cohoes, and Watervliet, the villages of Green Island and Waterford, and the town of Colonie. It is and has been for some time operated in practically three divisions. One embraces the local lines in the cities of Albany and Rensselaer. This will be styled the Albany division. Another embraces the cities of Troy, Cohoes, and Watervliet, the villages of Green Island and Waterford, and a part of the town of Colonie. This will be called the Troy division. The third is an interurban line extending from the Plaza in the city of Albany with a loop crossing the Congress street and Green Island bridges, and so reaching the city of Troy, and another line operating chiefly over the same tracks from the Plaza in Albany to the city of Cohoes. This will be called the interurban line. The general situation is shown by the accompanying map. The rate in the Albany division has been 5 cents with transfers; the rate in the Troy division 5 cents with transfers; the interurban rate Albany-Troy, Albany-Cohoes has been 10 cents and since 1916 without transfer privileges on either of the other divisions. Local cars have, however, operated from





Vol. VII.

Troy and from Albany to points intermediate at a single rate of 5 cents without transfers between these two semi-urban and semi-interurban lines. What is now sought is to install a tariff of 6 cents in the Albany division with transfer privileges, 6 cents in the Troy division with transfer privileges, and 6 cents on each part of the interurban lines, thus making the interurban Albany-Troy, Albany-Cohoes rate 12 cents with transfers at either end.

Incidentally it may be here stated that pending the proceedings an application came from federal officials for special consideration in the matter of rates on behalf of employees of the Watervliet arsenal who might live in Albany. This application was withdrawn, the officials stating that they would be satisfied with the proposed 12-cent rate with transfers.

At the hearing the attitude generally of the municipalities concerned was that they were willing to submit the matter to the Commission's investigation and to accept the proposed increases in rates if the Commission should find them justified. The City of Albany and its Chamber of Commerce appeared, and particularly on the part of the Chamber of Commerce, there was strenuous opposition based upon essentially four considerations:

1. It was alleged that there is a general over-capitalization of the United Traction Company.
2. It was alleged that by reason of its purchase of the Hudson Valley Railway Company securities the Traction Company has become burdened with a large charge which should not be reflected in rates charged passengers on its own lines. The circumstances of this purchase were stated by Commissioner Carr in his opinion *In the Matter of the United Traction Company's Proposed New Passenger Fares and Charges*, etc. [case No. 5772] decided February 20, 1917, VI Public Service Commission Reports, p. 70.
3. That the Albany system is in itself profitable and would still be so at the 5-cent fare if its operations were not loaded with the operations in the Troy division.

214 PUBLIC SERVICE COMMISSION, SECOND DISTRICT

P.S.C. 2d D.

4. That the original company or companies operating in Troy issued bonds which are now underlying securities of the traction company to such an extent that they should be cared for by the Troy patrons and not by the Albany patrons of the road.

As to the charge of over-capitalization it seems impossible to state so plainly or to reiterate so frequently the position of this and other Commissions that the public is not or can not be confused and misled by charges that unduly high rates are permitted in order to pay interest and dividends on what is commonly known as "watered securities.". What a corporation is entitled to is not necessarily sufficient return to pay dividends or even to pay interest. It is entitled to a fair return on the value of its property used and useful in the public service. *Smyth v. Ames*, 169 U. S., 466. In the circumstances of this case it is unnecessary for the Commission to make an actual appraisal of the property, for the determination has been made upon such lines that, allowing most liberally for any over-capitalization that may exist, the above principle can be applied. The capitalization is used only after extreme pruning, and incidentally only in order to reach a valuation basis of which no one except perhaps the company may complain.

As to the Hudson Valley purchase, whatever might in an appropriate case be said as to its wisdom or even its ethical aspects has no bearing on the determination of this case. The purchase was made by an issue of \$7,500,000 of stock of the traction company, but no bonds were issued for that purpose and no interest charge was created. In what follows it will be seen that this whole issue of stock is eliminated in an effort to get a minimum valuation of the traction company's property. Bonds of the Hudson Valley acquired by the traction company yielded in 1917 interest amounting to \$105,600. As against this there appear to have been advances made by The Delaware and Hudson Company, owner of the stock of the United Traction Com-

TABLE G

*Compiled from Annual Reports of U.S.***Balance sheet:***Assets side:*

Fixed capital
Other permanent investments
Materials and supplies
Cash
Loans and notes receivable, Hudson
Loans and notes receivable, other
Miscellaneous accounts receivable
Other current assets
Suspense, prepayments, special depd
Deficits
Totals

Liabilities side:

Capital stock
Funded debt
Loans and notes payable, Delaware
Loans and notes payable, other
Miscellaneous accounts payable
Other current liabilities
Reserves
Surplus

Income account:

Railroad operating revenues
Railroad operating expenses

Net operating revenue, railroad
Taxes accrued, railroad

Operating income, railroad

Non-operating income:
Rents
Interest
Dividends
Other

Total non-operating income

Gross income

Deductions from gross income:
Interest on funded debt
Other interest
Rents
Other deductions

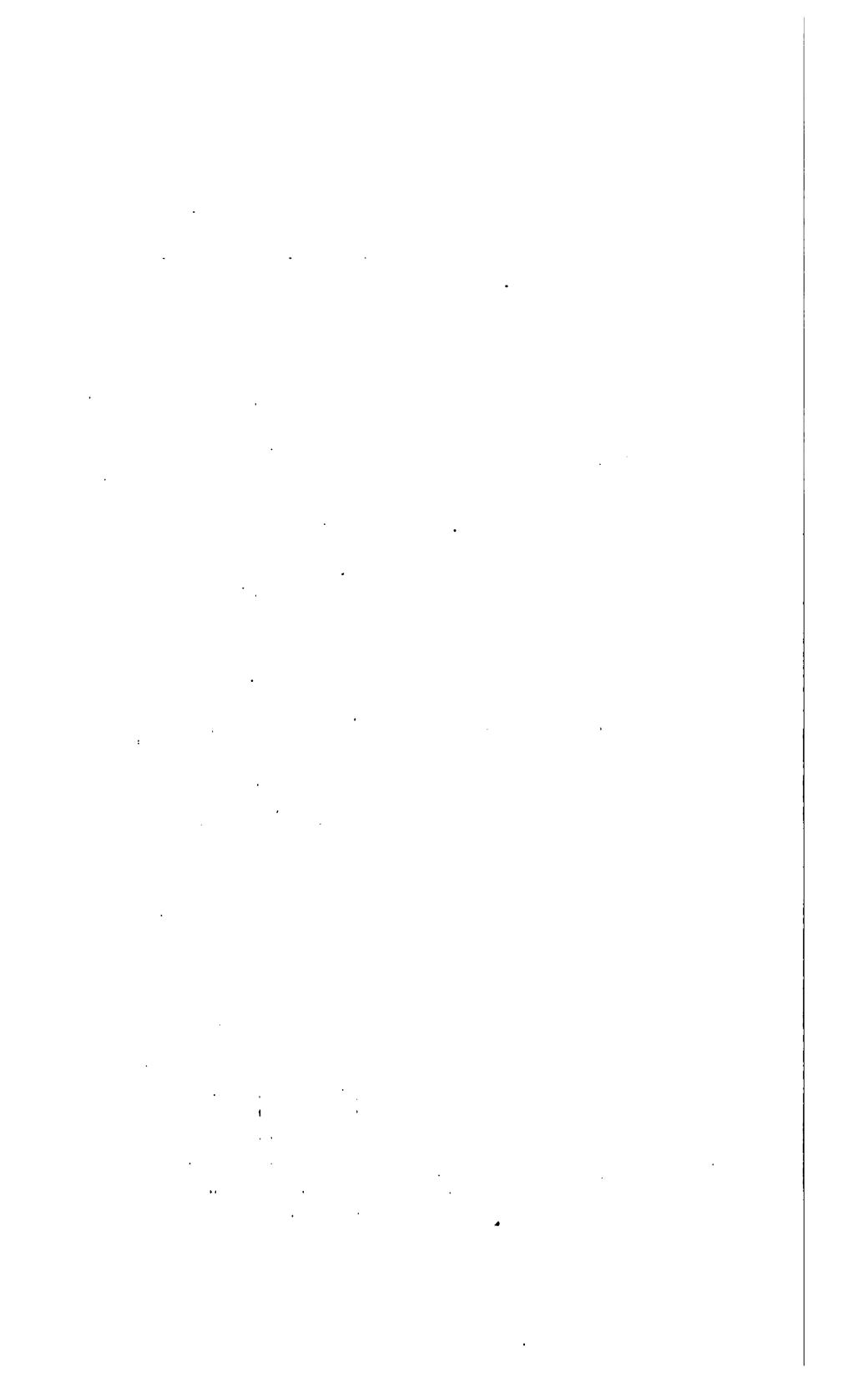
Total deductions from gross income!

Net corporate income

Surplus or deficit account:

Balance at beginning of year
Net corporate income for year
Miscellaneous credits
Dividends
Realised depreciation not covered by
Miscellaneous debits

Balance at close of year



pany, part of which were undoubtedly in behalf of the Hudson Valley Company, but their total amount is such that the burden is much less than the revenue provided from the Hudson Valley bonds. The United Traction Company is not now and has not for several years been paying dividends. It is not possible that it can properly pay dividends under the proposed 6-cent rates. Regardless, therefore, of the condition of the Hudson Valley and the value of its property acquired by the stock issue referred to, in the present circumstances for rate making purposes at least, the Hudson Valley is an asset and not a liability.

As to the underlying bonds on the Troy system this feature is clearly irrelevant to the present case. Interest on bonds is not an operating expense but technically a deduction from income which must be made before dividends may be paid. In other words, it is a return on invested capital. Proceeding on the basis of fixing rates with a view to the value of the property and not to a return of interest and dividends, it makes no difference in fixing rates whether a road was built with the proceeds of bonds or altogether by the sale of capital stock. Assuming that the Albany division was built entirely from the proceeds of stock, and the Troy division built entirely from the proceeds of bonds, and that the cost was exactly the same in each division, and the value of the property exactly the same the different methods of securing money for capital expenditures would have no effect on the rates.

Approaching now the question as to whether there is a general necessity for additional revenue we find the following results from operation in the years named in the table on folder facing page 8.

It must be borne in mind that the accompanying table shows actual conditions in previous years under the existing or previously existing rates, under the scale of wages formerly prevailing, and under commercial conditions where the cost of materials and other expenses, while gradually increasing,

216 PUBLIC SERVICE COMMISSION, SECOND DISTRICT

P.S.C. 2d D.

were much less than can be reasonably anticipated for the remainder of the period of the war.

These figures are not, however, conclusive. A comparison, and such comparisons are always dangerous, between the operating expenses of this company and the operating expenses of other companies in the large cities in the State shows that the expenses of the United Traction Company have been unusually high. Previous investigations of the Commission as disclosed by the opinions in cases already cited show that the traction company has failed until recently at least to maintain any depreciation reserve. Within the past few years it has been compelled to pay out unusually large sums for maintenance of way and maintenance of equipment. In the absence of reserves to meet these expenses the operating expenses have been unduly increased. The principal item of increased expense has been maintenance of way, and this is in large measure due to an extensive system of street improvements, particularly in Albany, involving the replacing of old track and the laying of new pavements. In reaching a conclusion the Commission has endeavored to discriminate between programme expenditures covering routine repairs and replacements which would ordinarily be borne as current operating expenses, and extraordinary expenditures which indicate the items which properly should have been provided against by a depreciation reserve. For maintenance of way and equipment the following figures appear:

	Programme expenditures	Extraordinary expenditures upon designated projects	Total
1913.....	<i>Dollars</i> 137,289.39	<i>Dollars</i> 80,017.22	<i>Dollars</i> 217,306.61
1914.....	201,373.73	44,456.15	245,829.88
1915.....	201,802.79	172,488.87	374,291.66
1916.....	244,215.69	101,892.56	346,108.18

Vol. VII.

It therefore becomes necessary in forecasting the future to make allowance for these extraordinary items of expense for the past few years and to reduce the operating expenses accordingly. The following table assumes that the proposed 6-cent fares are in effect with an estimated increase in operating revenue of about \$400,000. Much more than this can not be expected. The charges for current maintenance are made on the assumption that maintenance cost per revenue car-mile will normally be the same as the average cost per car-mile of eight other cities in this Public Service Commission district. This method is possibly severe upon the company. The depreciation allowance is added according to the scheme which the Commission has recorded itself as believing to represent the minimum rate that should be employed. No increase in general expenses over 1917 is allowed. The transportation expenses are based upon the company's estimate and include an increase over old rates of pay to those which have prevailed for several months. A strike was inaugurated against previously existing rates with a result that a compromise was reached whereby the pay of motormen and conductors was raised to 37½ cents an hour. It had previously been 31. The company estimates that this additional expense will amount to \$345,000 per annum. At the same time it was agreed to submit to the Federal War Labor Board for arbitration the question of a further increase, and the Commission is now informed that an award has been made fixing 40 cents as the minimum pay. The company's estimates have been checked and found to be approximately correct, but in the table appended there is not included the additional \$100,000 per annum which will probably result from the latest increase. In estimating revenue it has been assumed that the number of passengers will decrease 10 per cent because of the increase in rates. Expense of maintenance of way and structures, and of equipment are based on the expense of 1917 and it is more than probable that actual expense will show a decided

218 PUBLIC SERVICE COMMISSION, SECOND DISTRICT

P.S.C. 2d D.

increase. In allowing depreciation reserves no favor is extended to the company. They are in the interest of the public in order, to a certain extent, to ensure the ability of the company to make proper retirements and replacements, and so to maintain its service. The amount allowed is very moderate for that purpose.

Constructive income account for United Traction Company, 1918, assuming 6-cent fares, and elimination of deferred maintenance:

1917 passenger revenue.....	\$2,410,783
Estimated increase from 6-cent fares.....	407,434
Other operating revenue, 1917.....	48,065
Estimated operating revenue with 6-cent fares.....	\$2,866,282
Maintenance of way and structures on basis of average cost per revenue car-mile to eight other city traction companies in 1917.....	\$177,213
Depreciation of way and structures at approximately 2% of cost.....	109,735
Maintenance of equipment on basis of average cost per revenue car-mile to eight other city traction companies in 1917.....	203,613
Depreciation of equipment at approximately 2% of cost.....	54,868
Traffic, 1917.....	1,447
Transportation, company's estimate for 1918 on basis on first five months' actual.....	1,274,270
General, 1917.....	251,488
Estimated operating expenses.....	\$2,072,634
Taxes, company's estimate for 1918.....	195,000
	2,267,634
Operating income, estimated.....	\$598,648
Return on capital other than dividends:	
Rents, 1917.....	\$111,192
Amortization of landed capital, 1917.....	1,306
Interest on funded debt.....	314,620
Interest on floating debt, estimated.....	14,222
	441,340
Balance.....	\$157,308

In order to reach an appraisal much time and a large expenditure of money would be required. The company is confronted with a real emergency as disclosed by the foregoing statements.

The company has about one hundred twelve miles of track, a portion of which is operated under lease, but the entire burden of maintenance rests upon this company, and except nominally this company is the real owner. All except about ten miles is on paved streets. The company has rolling stock reasonably commensurate with such an extensive system. It has a power house, substations, and other power equipment, an office building, and car barns. Its balance sheet as of Decem-

Vol. VII.

ber 1, 1917, shows total fixed capital \$11,750,132.69 with construction work in progress \$414,499.88. It has outstanding \$6,500,000 of bonds none of which as above stated was issued on account of the Hudson Valley. This funded debt amounts to about \$58,000 per mile of track. A comparison of this and other items with the average of all electric railroads in the Second Public Service Commission District follows:

	Funded debt		Stock		Fixed capital	
	1916	1917	1916	1917	1916	1917
Other electric railroads.....	\$52,600	\$47,300	\$39,900	\$38,700	\$83,800	\$84,600
United Traction Company.....	58,000	.....	44,600	44,600	.....	104,700

It will be seen that the funded debt of the United Traction Company is somewhat above the average but the average given includes both urban and interurban lines, roads on unpaved highways, and roads of light equipment and light construction. The average of fixed capital per track-mile is much higher than the funded debt per track-mile of the United Traction Company. The ratio of the funded debt to the fixed capital accounts is not very different between the United Traction Company and the average of other roads. Corresponding figures for four of the larger systems in the State which might be deemed comparable, are as follows:

	Funded debt	Stock	Fixed capital
United Traction Company.....	\$58,000	\$44,600	\$104,700
New York State Railways.....	52,900	50,960	107,600
International Railway.....	70,600	42,000	109,200
Schenectady Railway.....	23,300	35,800	64,200

In these cases the mileage is taken by including leased lines and excluding the mileage operated over lines of other

companies through trackage contracts, the lines being in no sense the property of the operating company. The inference is very strong that the road is worth at least its funded debt. It may be worth much more. It seems safe to assume that it is entitled to earn interest on an amount equal to its funded debt and other fixed charges. In the estimate given above which certainly holds out as much hope to the company as it can dare to expect to be realized, there is left only a balance of \$157,308 after paying operating expenses and these fixed charges. When allowance is made of \$100,000 to meet the most recent increase in wages the estimate affords only about \$57,000 as a cushion to meet any errors in the estimate. Taking \$500,000 as the probable operating income this would yield a return of only $7\frac{1}{2}$ per cent on the value of the road assuming the funded debt to represent that value. This would not be more than a fair return if the sum estimated should be taken as the actual value. We are not in fact fixing \$6,500,000 as the actual value of the road, but merely as the irreducible minimum for the purpose of this case alone. If we had the actual value it would probably show that the possible income will yield much less than a fair return.

It is perfectly evident that, with the present revenues and the existing and coming expenses, there will be no return at all, and that the company would be facing inevitable bankruptcy.

Having reached the conclusion that the company is entitled to relief in the way of increased revenues we must ascertain whether the method proposed of effecting the increase is just and reasonable. The Troy zone as will be seen by reference to the map, while it is a group of politically separated municipalities, is compact and might for most purposes except those of government be treated as one community. In fact the industrial and social, using the latter term in its broader as well as its narrower sense, interests of those municipalities blend together to a large extent.

Vol. VII.

Indeed the Cities of Troy and Watervliet and the Village of Green Island, in adopting the resolutions waiving the fare restrictions in their respective franchises, have insisted that a common rate should be adopted in the group constituting the Troy zone. What is said of the Troy zone applies also to the cities of Albany and Rensselaer, but perhaps not to the same extent. We must remember, however, that section 181 of the Railroad Law makes the municipality the unit, and we can not relieve the company from the operation of this section without finding that in the particular municipality affected the income is insufficient to yield an adequate return. The operating expenses have not been segregated by municipalities. The Uniform System of Accounts has not required that they should be so segregated and a complete segregation, except as many items of expense might be roughly and inexactly apportioned, is impossible. The travel in the Troy zone is so largely from one municipality to the other that it may be safely assumed that the same conditions apply substantially in each. It has not been claimed as to this zone that there is any substantial difference in operating results as between the different municipalities. It must be inferred that the inadequacy of return so far as it is applicable to this zone distributes itself fairly evenly among the municipalities composing it. Certainly there is no ground for any inference that the company operating in any single one of those municipalities could operate at a profit at present fares.

It is urged, however, that Albany stands on a different footing, and that the Albany operation taken by itself would show a reasonable profit under existing rates. Undoubtedly the revenues in the Albany zone are much higher than those of the Troy zone. The number of passenger fares in 1917 were in the Albany zone 21,764,171; in the Troy zone 16,305,331, the revenue per car seat-mile in the Albany zone is calculated from the evidence and reports of the company about 4.32 cents, in the Troy zone 3.41 cents. It is

claimed that the cost of operation is much greater in the Albany zone than in the Troy. This is undoubtedly true, but unfortunately we are without evidence to determine what the difference is. It seems that the principal cause of the difference is that practically all the lines in Albany have to surmount very considerable grades, and that these are mostly close to the business center and in the region of congested travel. There are grades also in the Troy division, but they are in more outlying districts, much fewer cars are operated, these cars are much lighter, and the traffic is much lighter in the hill region than in the level parts of the district. These conditions lead to a very considerable power expense in Albany as against Troy, and a greater cost of car maintenance. There is testimony to the effect that the cost of operation under the present wage scale (that put in force in May) would result in an operating cost of upward of 37 cents per car-mile but there are only two lines in Albany which in 1917 realized such earnings. These are the West Albany and the Albany Belt lines, the former 40.89 cents and the latter 45 cents. What was termed a "weighted average" for the Albany zone was 28.61 cents. Two inferences may be drawn from these facts: First, the essential one from a legal standpoint to draw that the Albany operation in and by itself would not yield an adequate return under existing conditions and that, therefore, an increase in fares is essential in Albany. Second, that the difference between Albany and Troy is not so great as to warrant a difference in fares in order to provide the revenue absolutely necessary. A 5-cent rate in Albany would impose a very much higher rate on Troy with Albany operation unprofitable. With a 6-cent rate in Albany it does not become necessary to increase the Troy rate beyond that amount under present circumstances.

The proposed schedule is simple, and operates uniformly. It provides liberally for transfers and restores them between interurban lines and the lines in the Troy and Albany zones.

The writer is still individually of the opinion that generally speaking, transfers between interurban and urban lines are undesirable, and that interurban rates ought to be adjusted in such manner as to permit their exclusion. The company admits that the elimination of transfers between the interurban and the urban cars in February, 1917, has not resulted as it was hoped, and the patrons remain discontented. On the whole, therefore, it seems that the proposed tariffs are about as fair as could at present be devised, if we preserve the established American policy of uniform rates throughout the city without creating fare zones or distinguishing between different lines.

We are dealing now with an emergency. The northern communities in waiving the franchise restrictions limit their waivers, Troy until the signing of a general treaty of peace, Watervliet and Green Island until twelve months after the signing of such a treaty. The order will provide that the rate therein fixed shall be limited in duration to the shorter period unless the Commission upon a showing of changed conditions shall otherwise determine. It may be that during the continuance of the war conditions may so change as to demand either a reduction or a further increase. If such should be the case the rights of the municipalities under their franchises and the law would, of course, be respected by the Commission.

Commissioners Hill, Fennell, and Cheney concur. Commissioner Barhite not present.

224 PUBLIC SERVICE COMMISSION, SECOND DISTRICT

P.S.C. 2d D.

Petition (or Complaint) of WESTERN NEW YORK AND PENNSYLVANIA TRACTION COMPANY under subdivision 1, section 49, Public Service Commissions Law, for permission to increase passenger fares. [Case No. 6479.]

After an examination of the operations of the petitioner it was permitted to file tariffs based on a rate of $3\frac{1}{2}$ cents a mile with rates of 7 cents within the cities of Olean and Salamanca.

Decided September 5, 1918.

Appearances:

Messrs. Dowd & Quigley, by James E. Quigley, Olean, N. Y., for petitioner; *John K. Ward*, Olean, N. Y., for the City of Olean; *Foster Studholme*, Mayor of Olean.

Emmet E. Warn, Mayor of Salamanca; *J. M. Seymour*, city attorney, Salamanca, N. Y.

T. C. Jordan, Limestone, N. Y., for the Village of Limestone.

IRVINE, Commissioner:

The Western New York and Pennsylvania Traction Company operates an electric railroad mainly interurban. Taking Olean as a center its interurban lines extend easterly to Bolivar in Allegany county with a branch from near Ceres to Shingle House, Pennsylvania. Southerly from Olean a line extends across mountains to Bradford, Pennsylvania. Another line extends westerly to Salamanca, and thence to Little Valley in Cattaraugus county. Diverging from this at Seneca Junction another line extends southerly to Bradford, Pennsylvania. There seems to be a still further line from Bradford to Lewis Run, Pennsylvania. There is urban operation over the interurban line in Salamanca, and over the interurban, and also over local lines in the city of Olean.

WESTERN NEW YORK & PENNSYLVANIA TR. CO. 225

Vol. VII.

The interurban line passes through several incorporated villages but the intra-village operation must necessarily be negligible. The entire extent of the company's lines is about one hundred (100) miles, much the greater part of which is in the State of New York. The petition is for permission to increase the urban rates of fare in the cities of Olean and Salamanca from 5 cents to 7 cents and to increase the through rates within the State of New York to a basis of $3\frac{1}{2}$ cents per mile. The city of Olean has a population of approximately 20,000; the city of Salamanca a population of approximately 10,000; the city of Bradford in Pennsylvania a population of approximately 17,000. The evidence indicates that the population of the entire region served by this system does not exceed 75,000. It will thus be seen that it is an extensive system operating in three considerable communities, two of which are in the State of New York and one in Pennsylvania, and that the remainder of the territory is sparsely peopled. It may be added that in large part it traverses a terrain difficult of operation.

One difficulty usually confronting the Commission in such cases is eliminated in this: there has been a complete inventory and appraisement of the property of the corporation used in the public service with an allocation thereof as to the two cities concerned in this application, Olean and Salamanca. This has been approved by the Commission. The total fixed capital is \$4,425,378.89. The total "bare bones" allocation to the City of Olean is \$160,576.11; to Salamanca \$87,035.30. Apportioning general costs on a percentage equivalent to the ratio of the total general costs to the total "bare bones" costs, we have a valuation for the City of Olean of \$251,594.55; for the city of Salamanca \$136,390.37. In this total valuation there appears only about \$22,000 of intangibles. It may be here stated that the company has had outstanding first preferred stock 6 per cent cumulative \$599,355; second preferred stock 5 per cent non-cumulative \$1,000,000; common stock \$1,000,000.

226 PUBLIC SERVICE COMMISSION, SECOND DISTRICT

P.S.C. 2d D.

By canceling the common stock the capitalization is reduced to the actual appraisal. This step the corporation is in position to make, has undertaken to make, and is in process of making. The result will be a corporation with outstanding capital securities only \$22,000 in excess of the actual value of its tangible assets. Its management is to be commended for placing the corporation on this solid basis.

The following tables show: *a.* In a condensed form the income account for 1916 and 1917, and the first three months of 1918, for the entire system. There are estimated corresponding figures for the complete calendar year, assuming the proposed rates to be in effect. The column headed 1 is on the basis of the number of passengers remaining unchanged; column 2 on the theory that passenger travel will decrease 10 per cent because of increased rates.

b. A corresponding table relating to the city of Olean.

c. A corresponding table relating to the city of Salamanca. In the case of the two cities, however, we have the actual results of four months of operation instead of three, upon which to estimate the complete calendar year. Each table also shows the ratio of return upon fixed capital in the case of the cities, allocated and apportioned as above stated.

ENTIRE SYSTEM

Item	1916	1917	Three Months, 1918	Estimated, Complete Calendar Year	
				1	2
Gross receipts.....	Dollars 449,746.51	Dollars 456,174.95	Dollars 100,375.11	Dollars 640,000.00	Dollars 599,000.00
Operating expenses.....	254,208.17	293,652.85	75,251.34	360,000.00	360,000.00
Net earnings from opera- tion.....	195,538.34	162,522.10	25,123.77	280,000.00	230,000.00
Taxes.....	23,960.53	27,580.65	8,002.58	32,000.00	32,000.00
Net income.....	171,577.81	134,941.45	17,121.19	248,000.00	198,000.00
Total fixed capital allo- cated.....			\$4,425,378.89		
Ratio of annual return upon fixed capital	3.88%	3.05%	1.55%	5.6%	4.47%

WESTERN NEW YORK & PENNSYLVANIA TR. CO. 227

Vol. VII.

CITY OF OLEAN

Item	1916	1917	Four Months, 1918	Estimated, Complete Calendar Year	
				1	2
Gross receipts.....	Dollars 59,656.85	Dollars 60,767.59	Dollars 18,548.97	Dollars 82,000.00	Dollars 73,000.00
Operating expenses.....	22,817.23	37,530.06	13,837.53	47,000.00	47,000.00
Net earnings from opera- tion.....	36,839.62	23,237.53	4,711.44	35,000.00	26,000.00
Taxes.....	5,158.57	6,617.23	2,712.54	8,000.00	8,000.00
Net income.....	31,681.05	16,620.30	1,998.90	27,000.00	18,000.00
Total fixed capital allo- cated.....			\$251,594.55		
Ratio of annual return upon fixed capital.....	12.59%	6.6%	2.39%	10.73%	7.15%

CITY OF SALAMANCA

Item	1916	1917	Four Months, 1918	Estimated, Complete Calendar Year	
				1	2
Gross receipts.....	Dollars 19,167.18	Dollars 19,786.21	Dollars 4,624.79	Dollars 27,000.00	Dollars 24,000.00
Operating expenses.....	10,543.88	12,219.96	3,450.09	15,000.00	15,000.00
Net earnings from opera- tion.....	8,623.32	7,566.25	1,174.70	12,000.00	9,000.00
Taxes.....	1,440.55	1,865.58	1,148.93	3,500.00	3,500.00
Net income.....	7,182.77	5,700.67	25.77	8,500.00	5,500.00
Total fixed capital allo- cated.....			\$136,390.37		
Ratio of return upon fixed capital.....	5.34%	4.18%	0.06%	6.23%	4.03%

The company has been paying in the past to its motormen and conductors only from 21 cents to 27 cents an hour according to length of service. An immediate and very considerable increase has become necessary in order that it may retain or obtain platform men. In estimating operating expenses an increase has therefore been allowed of 25 per cent to cover not only this increase in pay but also increases of other labor and material, of which everyone may now take notice, or if he do not notice will be thrust upon him. For the entire system no increase has been calculated in general and miscellaneous expense. For the cities of Olean and

Salamanca such increases have not been excluded, partly because they would have no material bearing on the result and partly because it is thought that other increases are likely to be greater than in the country districts.

The following conclusions result: 1. The system as a whole has not in the past yielded anything like an adequate return and under the new rates proposed it is not likely to yield more than 4½ per cent which is still inadequate to attract capital.

2. In the city of Salamanca the return has in the past been inadequate and under the proposed rates the return is not likely to be much more than 4 per cent.

3. In the city of Olean the return in the past has been fairly adequate and under the proposed rates a return of about 7 per cent is probable. This is certainly no more than an adequate return.

The company needs an increase in both cities and throughout its line. The increases proposed ought to yield a fairly adequate return in Olean but can not be expected to do so in Salamanca or on the entire system. The company should not be required to accept an inadequate return in Olean merely because it must content itself with an inadequate return as an entirety or in the city of Salamanca. A 6-cent fare or a rate of 3 cents a mile would not promise an adequate return or anything approaching an adequate return on the property as a whole or even in the city of Olean. The rates proposed are high, but in view of the circumstances the Commission can not find that they are unreasonable.

Owing to the inadequate return of past years the corporation has been unable to maintain its property in such condition as to afford the service to which the public is justly entitled. Under the new rates it should be able to pay the fixed dividends on its preferred stock and to devote a considerable sum to maintenance and deferred maintenance. No further dividends should be paid until the road is fully rehabilitated.

The franchise under which the corporation operates in the city of Salamanca contains a restriction limiting the rate of fare to 5 cents in Salamanca, and between Salamanca and East Salamanca. The municipal authorities have enacted an ordinance which has been accepted by the corporation amending such franchise so that the corporation may charge such rate of fare as this Commission may fix, but with two conditions: One is that any excess over 5 cents shall not be continued for a longer period than three years from the date of the ordinance (June 18, 1918), but that it may be continued for a period ending one year after the close of the war. This expression is somewhat ambiguous but a proper limitation for all rates seems to be that they shall not continue beyond one year after the signing of a general treaty of peace unless the Commission shall in the meantime otherwise determine, subject to the rights of the City of Salamanca and the other communities under the law. The other condition is that the company shall operate its local lines between East Salamanca and West Salamanca on a 40-minute schedule between the hours of 6:30 a. m. and 11 p. m. The present service is hourly. It is not necessary in the order to insert this condition. It is not to be presumed that the corporation after accepting the ordinance will violate it. Should it do so the Commission in its regulative capacity will entertain a complaint.

Accompanying the petition is a copy of the proposed schedule of rates and tariff regulations. The proposed changes in rates are indicated in ink, and do not seem in all instances to conform strictly to the prayer of the petition or the terms of the order which will be entered. Therefore, the order is not to be taken as an approval of the proposed tariffs so presented, but it is an approval of the basis upon which the tariffs may be constructed. When the tariffs are filed it is expected that any variations from the order or errors in computation will be corrected. The proposed tariff regulations also contain changes in some other respects. These changes

230 PUBLIC SERVICE COMMISSION, SECOND DISTRICT

P.S.C. 2d D.

were not called to the attention of the public by the petition or the notices of hearing, and were not the subject of investigation. Any changes in rates or regulations other than those herein discussed and provided in the order must be made in the regular way upon statutory notice to the Commission and the public.

All concur except Commissioner Barhite not present.

In the Matter of Complaints of COMMUTERS *against*
ROCHESTER AND SYRACUSE RAILROAD COMPANY, INC., as
to proposed increase in commutation passenger fares.
[Case No. 6424.]

Decided September 10, 1918.

Appearances:

H. D. Bailey, Syracuse, N. Y., for complainants.

Frank M. Parsons, Weedsport, N. Y., for the Village of Weedsport.

R. V. Avery, Lyons, N. Y., in person.

Hiscock, Doheny, Williams & Cowie, by Mr. A. H. Cowie, Syracuse, N. Y., for respondent.

T. C. Cherry, Syracuse, N. Y., as vice-president and general manager of respondent.

CHENEY, Commissioner:

This proceeding concerns complaints filed against the commutation rates included in the tariff filed by the Rochester and Syracuse Railroad Company, Inc., effective May 5, 1918. Four complaints were filed against the rate from Weedsport to Syracuse, two against the rate from Jordan to Syracuse, one against the rate from Lyons to Syracuse, two against the rate from Palmyra to Rochester, and one against the rate from Macedon to Rochester. These complaints were consolidated and tried as one case. At the hearing the complainants upon the Syracuse end were represented by counsel. The complainants upon the Rochester end did not appear. These commutation rates were constructed upon the basis of $1\frac{1}{4}$ cents per mile between the different stops upon the road and the city line of Syracuse and Rochester, respectively, and in those cities the regular city rate is added. The complaints are informal but are generally based upon the ground that the rates are unjust as being too high.

While a commutation rate is concededly a lower rate than that for which ordinary passengers are carried and is justified upon the theory that a regular rider who uses the road every day should have a low rate because of the advantages accruing to the railroad from having regular users resident upon its lines [*Taxpayers Alliance v. The N. Y. C. R. R. Co.*, P. U. R. 1917 B, 264; *In re Long Island R. R. Co.*, P. U. R. 1917 C, 1019] still the Commission has not arbitrary power to fix such rates, but is required by the law to take into account the cost of giving the service and return on invested capital.

This rule has been stated by the United States Supreme Court in a recent case in the following language:

It was recognized that the state has broad field for the exercise of its discretion in prescribing reasonable rates for common carriers within its jurisdiction: that it is not necessary that there should be uniform rates or the same percentage of profit on every sort of business; and that there is abundant room for reasonable classification and the adaptation of rates to various groups of services. It was further held that despite this range of permissible action, the state has no arbitrary power over rates; that the devotion of the property of the carrier to public use is qualified by the condition of the carrier's undertaking that its services are to be performed for reasonable reward; and that the state may not select a commodity or class of traffic, and that instead of fixing what may be deemed to be reasonable compensation for its carriage, compel the carrier to transport it either at less than cost, or for a compensation that is merely nominal. [*Norfolk & Western R. R. Co. v. Conley*, 236 U. S. 605; see also *Northern Pacific R. R. Co. v. No. Dakota*, 236 U. S. 585.]

Applying this rule to the matter of reducing commutation fares, the United States District Court has distinctly held that in order that a commission may prescribe reduced commutation rates, it must at least appear that the aggregate return to the carrier is just, fair, and reasonable, and if it falls short of this, even to a negligible extent, such reduction is not justified; and it can not be supported on the grounds of local public demand or interest, by the commission's views of the probable beneficial effects of such rates upon the com-

pany's business, or by what other carriers have done or have been required to do under different conditions in different localities. [*Kansas City, etc., Railroad Co. v. Barker*, 242 Fed., 310.]

The power of this Commission is defined by section 49 of the Public Service Commissions Law, the material parts of which read as follows:

Whenever either Commission shall be of the opinion, after a hearing had upon its own motion, or upon a complaint, that the rates, fares or charges demanded, exacted, charged or collected by any common carrier, railroad corporation or street railroad corporation subject to its jurisdiction for . . . commutation passenger tickets . . . or any other form of reduced rate tickets for the transportation of persons within the state . . . are unjust, unreasonable, unjustly discriminatory or unduly preferential, or in any wise in violation of any provision of law, or that the maximum rates, fares or charges collected or charged for any of such forms of reduced fare passenger transportation tickets by any such common carrier, railroad or street railroad corporation are insufficient to yield reasonable compensation for the service rendered, and are unjust and unreasonable . . . the Commission shall, with due regard, among other things, to a reasonable average return upon the value of the property actually used in the public service, and to the necessity of making reservation out of income for surplus and contingencies, determine the just and reasonable rates, fares and charges to be thereafter observed and enforced as the maximum to be charged for such . . . commutation . . . or any other form of reduced rate tickets for the transportation of persons.

From this it would appear that the Legislature, in its grant of power to this Commission to fix commutation rates, has expressly directed it to apply the rules laid down by the courts as stated in the foregoing cases, and should the Commission do otherwise it would violate both precedent and statute.

The Rochester and Syracuse Railroad Company, Inc., operates an interurban electric road from Syracuse to Rochester. This road was built about ten years ago by the Rochester, Syracuse and Eastern Railroad Company and was operated since that time by that company and by the Empire United Railways, Inc., into which it was consolidated,

until November, 1917, when receivers were appointed. The receivers operated the railroad, pending foreclosure proceedings upon the mortgage existing thereupon until the sale. The property was bought in at the foreclosure sale by a committee of the bondholders who formed the present company under a reorganization agreement which was approved by this Commission, and the present company has operated the road since September 1, 1917.

The accounts of these companies have been frequently before this Commission in capitalization cases, and it has had occasion to determine the amounts of capital actually invested in the company, at different times. From the evidence before the Commission in those cases it may be said that the amount actually invested in this property fairly equals \$6,500,000. It appeared in the reorganization case that the road and equipment actually cost \$7,237,473.45 and that the reproductive cost would be a much larger figure. The authorized bond issue of the Rochester, Syracuse and Eastern Railroad Company at the time of foreclosure was \$5,000,000, of which all but a very small amount was issued and outstanding in the hands of the public. Upon the reorganization the bond issue was limited to \$2,500,000; preferred stock issued was \$2,500,000; and common stock \$1,500,000; practically all of which is in the hands of the original bondholders and represents what they have to show for the bonds which they held originally.

The present company began operation September 1, 1917, and reports of operation up to March 31, 1918, covering seven months, show total revenue \$399,970.98, total operating expenses \$301,828.28, taxes \$19,500, leaving a gross income of \$78,642.70, out of which to pay fixed charges, interest, and return to stockholders. During that period the bond interest amounted to \$62,681.77; other interest and rent deductions \$32,704.88, leaving a net corporate deficit for seven months' period of \$16,143.95. It is true that that period includes the portion of the year when the income was

the smallest and the operating expenses the largest, and therefore a fair estimate of a year's operation can not be made by projecting these figures forward for twelve months in the same proportion. But enough is shown to make it evident that a fair return would not be realized by the operation of the road under the rates in force during that time.

In April, 1918, the company filed a tariff schedule which it proposed to make effective May 5, 1918, which generally readjusted its rates, lowering some and increasing others, but which was built upon certain fixed principles. The old fares were arranged upon a basis of multiples of 5 cents, which was the minimum fare, in such a way that the rates between the different stops approximated as near as could be 2 cents per mile for cash fares and $1\frac{3}{4}$ cents per mile for ticket fares, with the commutation fares fixed at an arbitrary figure, not upon a mileage basis, but decreasing per mile for the longer hauls. The new fares are arranged on the mileage basis with a 6-cent minimum, the cash fare being $2\frac{1}{4}$ cents per mile, the ticket fare 2 cents per mile, the commutation fare $1\frac{1}{4}$ cents per mile, and the mileage book $1\frac{3}{4}$ cents per mile. These fares are computed to the city line at both Syracuse and Rochester, and the regular city fare in those cities is added to the rate, as the cars of the company are operated in those cities over the tracks of the local companies.

No computation of estimated revenues upon the basis of the new schedule of rates has been furnished to the Commission in this case, and we have no accurate means of determining whether or not the operation of the road thereunder would yield a fair return, or more or less than a fair return upon the capital invested in the service. No complaint has been filed against any of the rates in the new schedule except the commutation rates as above stated.

Since the beginning of this proceeding a report of the operation of the company for the three months ended June 30, 1918, has been filed. This shows the result of opera-

tion under the new schedule of rates for practically two months of that period, and this is much better evidence than any estimate can ever be. From this it appears that the total revenue for the quarter was \$207,881.53, operating expenses \$149,993.76, taxes \$10,500, leaving income applicable to return \$47,387.77. The interest on funded debt was \$29,712.40, other interest and rent deductions \$15,246.33, making the net corporate income \$2429.04. If these results fairly reflect what may be expected from the new rates, they do not indicate that a fair return will be realized.

No evidence has been presented as to the cost of furnishing service to commuters alone; and it is difficult to see how any such evidence could be given as they are comparatively few in number, and are carried on the same cars as are all other classes of passengers; and therefore in determining the fairness of the commuters' rate, resort must be had to another kind of evidence. Proof has been given of the commutation rates in force upon other electric interurban roads in the same vicinity, and while such evidence should be carefully scrutinized for the reason that operating conditions can hardly ever be the same on different roads [*San Francisco R. R. Co. P. U. R. 1917 E*, 546] it may be used in the absence of better proof. Most of these rates are constructed on the principle of a lower mileage for the longer haul rather than a uniform rate per mile. On the Empire State railroad the commutation rate varies from 1.15 cents to 1.21 cents; on the Auburn and Syracuse railroad from 1.06 cents to 1.22 cents; on the Syracuse and Northern railway from 1.26 cents to 1.41 cents. The Syracuse and Suburban Railroad Company had no commutation fare, but issued a coupon ticket book, by the use of which on the commutation basis the rates would vary from 1 cent to $1\frac{1}{4}$ cents per mile. It is only fair to state that this company has now pending before the Commission a proceeding in which it seeks approval of a proposed new tariff schedule in which the commutation rate is placed at $1\frac{1}{2}$ cents per mile. We are also

asked to make comparison with the rates on the New York Central railroad, a steam railroad operating in the same territory. These rates, since the increase effected by the order of the Director General of Railroads, range between .87 cents and 1.29 cents per mile. It appears, however, that the railroad stations in almost every case are situated a long distance from the business centers of the villages served and that practically no local train service is furnished, while the Rochester and Syracuse railroad runs directly through the business centers and furnishes hourly service. It is evident that such evidence is not very helpful. But the comparison between the rates of the Rochester and Syracuse and the other railroads mentioned does not show such a great disproportion as would justify a finding that they are for that reason unjust or unreasonable.

We are aware from the evidence in other cases now pending before us that there has been, and still continues to be, a great increase in the cost of labor and all kinds of materials used in the operation of electric railroads. The War Labor Board has recently materially increased the wages of employees of street railroads in the territory in which this road is located and in all probability it will be obliged to meet such increases, thereby greatly increasing operating costs. In view of all the circumstances we think that we can hardly say that the rates complained of are unjust or unreasonable, and prefer to allow operation under them to continue for a sufficient length of time so that accurate data as to the effect of such operation may be available, and the complainants may then, if they are so advised, make an application to reopen the proceeding.

All concur except Commissioner Barhite not present.

238 PUBLIC SERVICE COMMISSION, SECOND DISTRICT
P.S.C. 2d D.

In the Matter of the Complaint of the STATES METALS Co., INC., of Mellenville, Columbia county, *against CHATHAM ELECTRIC LIGHT, HEAT AND POWER COMPANY*, asking that three phase current be furnished. [Case No. 6451.]

The certificate of incorporation of a public service corporation and the permission granted to it by a Public Service Commission to transact business, not alone extend to it certain privileges, but impose upon it certain obligations, and one of those obligations is a readiness to respond, even at expense, to all reasonable demands for the product furnished by it.

Decided September 17, 1918.

Appearances:

Messrs. Scott, Gerard & Bowers for complainant.
John C. Dardess, Esq., for respondent.

BARHITE, Commissioner:

The complainant is a chemical manufacturing company located at Mellenville in the county of Columbia, New York. The plant has been recently purchased and already \$31,000 or \$32,000 has been spent in getting it ready for use. Ultimately it is expected that from \$75,000 to \$100,000 will be expended in improvements. It is the intention to operate for twenty-four hours continuously during the seven days of the week. Sulphurette of antimony is manufactured. This substance is used in compounding rubber, and is a product employed for war purposes. The company has in mind the production of other war material.

The respondent is a public utility corporation which exclusively supplies electricity for light, heat, and power in the locality where the plant of the complainant is situated. At the present time the respondent supplies only single phase current which is used for lighting and to run small motors. The complainant desires the respondent to furnish three phase current which is the standard for power

purposes except possibly for small motors. The complainant is now using steam and a water power which will not furnish the required power for more than two hours in the forenoon and two hours in the afternoon. The single phase current now furnished by respondent is not sufficient if it were suitable to give the power needed by the complainant.

The complainant claims that its plant was bought after a contract had been made with the respondent company to furnish the electric current desired. This claim is disputed by the respondent, and I do not find sufficient evidence in the record to uphold the claim of the complainant. There is evidence that negotiations were had between the parties upon the subject of power, but these negotiations did not make a contract. The complainant also holds that the respondent should be required to furnish the power although no contract was made, as the situation warrants such direction on the part of the Commission. I am inclined to support this claim and to hold that the Commission has the power to order the required improvements. Section 65 of the Public Service Commissions Law provides: "Every electrical corporation . . . shall furnish and provide such service, instrumentalities and facilities as shall be safe and adequate and in all respects just and reasonable." Section 66 provides that each Commission shall have power "to order reasonable improvements and extensions of the works, wires, poles, lines, conduits, ducts and other reasonable devices, apparatus and property of gas corporations, electrical corporations and municipalities."

So long as the respondent remains the only source from which electric power can be obtained in a particular locality, it must expect to a reasonable extent to meet the demands for power in that locality. Its certificate of incorporation and its permission to transact business by the Public Service Commission, Second District, not only extended to it certain privileges, but imposed upon it certain obligations, and one of these obligations is a readiness to respond to all

reasonable demands for light, heat, or power, and to make such additions or improvements as may be necessary to meet such demands. A public service corporation can not be permitted to dominate a certain locality, and then be allowed to say how far and to what extent it will render service.

The water power owned by the complainant is sufficient only to run its machinery for two hours in the forenoon and two hours in the afternoon. No hardship is to be imposed upon the power company as the complainant in its brief states it is willing to pay a fair and reasonable amount for the power it uses although such rate is in excess of the rate now charged, and is further willing to make a contract to take at least 9000 kilowatt hours of energy per month. The complainant will further undertake to supply the necessary transformers to reduce the voltage from that at which it is supplied to the voltage required to run the plant.

The answer of the respondent is to the effect that the expense of the improvement is too great, and that the margin it would receive over the amount it pays for power is too small, taking into account the transformer losses and the line losses. The last contention noted may be well taken. Under its filed schedules the company makes a fair profit for the first 500 kilowatt hours per month. Beyond the first 500 kilowatt hours per month the rate is but slightly in excess of the amount paid. No opinion is expressed as to whether the published rate for over 500 kilowatt hours per month is sufficient to earn a fair amount for the power company. That matter, if necessary, can be determined at a later date and the complainant offers to pay whatever amount is fair and proper. The figures given by the experts called by the complainant and those of the respondent as to the cost of the improvement differ widely. The manager of the complainant states there are two ways by which the desired result can be reached. By one method an additional transformer could be placed at Chatham, and an additional

wire run from Chatham to Mellenville. His estimate of the cost of this method is \$4150. Another method is to place the transformer at Ghent and run the third wire from that place to Mellenville. The cost of the latter method was estimated to be \$3344. Which would be the better method or the more expense to operate may well be left to the power company. The estimate of an outside electrician places the cost of construction with the necessary apparatus from Chatham to Mellenville to be \$3962. The president, treasurer, and general manager of the power company stated that it would cost approximately \$7423 to meet the requirements of the complainant. This figure however includes the transformer at the mill, which complainant is willing to furnish. In a letter written to the complainant by this witness it was stated that the cost would be between \$4500 and \$5000, and it would seem from the evidence that the cost would be nearer to those amounts than that stated in the answer of the respondent. It is practically conceded by the respondent that the present current will not be sufficient for the present and the future needs of the complainant; the line should not be loaded with motors large enough to do the work. It follows that if the complainant is willing to make the concessions stated in its brief that the respondent should make the required improvements.

All concur except Commissioner Cheney not present.

242 PUBLIC SERVICE COMMISSION, SECOND DISTRICT
P.S.C. 2d D.

In the Matter of the Complaint of the TRUSTEES OF THE INCORPORATED VILLAGE OF FALCONER, Chautauqua county, *against PENNSYLVANIA GAS COMPANY* as to proposed discontinuance of furnishing natural gas in said village. [Case No. 6435.]

This Commission believes in the conservation of natural gas; that it should be used carefully and with a due regard for the failing supply; that only that class of customers who were not contemplated as such but who now use enormous quantities because it is cheap should be deprived of a supply; that wastefulness should be prevented and the use of any more than the necessary amount should be prohibited.

Decided September 17, 1918.

Appearances:

Walter H. Edson, Esq., for the complainants.
Messrs. Fisher and Fisher for the respondent.

BARHITE, Commissioner:

This proceeding is instituted by the Trustees of the Village of Falconer for the purpose of restraining the Pennsylvania Gas Company, hereinafter called the Gas Company, from shutting off the supply of natural gas from that village. The respondent by its answer admits that it is its intention to shut off the supply of gas from the village on December 1, 1918. It is further admitted in the answer that the Gas Company received its franchise from the village on October 4, 1899, and that the buildings in said village have been equipped with appliances for the use of natural gas to the amount of several thousand dollars and that nearly all the inhabitants depend largely and many entirely upon gas furnished by respondent for heating, cooking, and lighting. The reason which respondent gives for its intended action is that it is unable to furnish a sufficient supply of gas for all its customers during severe winter weather. The Gas Company is a Pennsylvania corporation and supplies with

gas several cities and villages in that State and brings its line across the state line into New York and supplies the city of Jamestown and the village of Falconer. In the year 1917 the Gas Company furnished to the city of Jamestown 1,664,805,000 cubic feet and to the village of Falconer 82,828,000 cubic feet. Practically Jamestown and Falconer are one municipality. Legally they are separate and distinct. Falconer lies to the east of Jamestown and the adjoining boundary lines of the two municipalities are coincident. The pavement on Second street in the city is continuous with the pavement on Main street in the village. The same street car system and the same water system serve both places. The business and the social relations of the two communities are intermingled. As a prominent citizen of the city expressed it, it is hard from an ordinary inspection of the vicinity to distinguish any dividing line between the city of Jamestown and the village of Falconer. The pipes of the Gas Company in the city are continued into the village and furnish the supply for that locality. So far as appears from the record or has come to the knowledge of this Commission there is no intention to cut off or limit the supply in the city. The only reason given why Falconer is chosen for the sacrifice is that it is the last municipality to which the Gas Company extended its mains.

This Commission is well aware of the natural gas situation in Western New York. It believes as the Gas Company contends that the supply of natural gas is failing and that extremely low pressures may result in danger to the customers. In previous memoranda and orders it has indicated its views. The Commission in nowise recedes from the position it has hitherto taken. That position does not contemplate the sudden shutting off of gas for every purpose from whole communities. It is based upon the necessity of shutting off certain classes of users during the period of small supply who originally were not considered as possible customers but who now burn gas on account of its cheapness

and in enormous quantities. It is based upon a prevention of wastefulness among domestic consumers by causing careful methods in its use, and the disuse of furnaces and other appliances which do not develop the heating qualities of the gas to their full extent. It aims at preventing the extension of mains. The purpose of the Commission is the conservation of gas and not the total prevention of its use until the companies are willing to make arrangements to augment the natural product by the addition of sufficient of the manufactured article to supply the deficit. The city of Jamestown uses over twenty cubic feet of gas to every cubic foot used by the village of Falconer, and means adopted for the conservation of gas in what is one community is a much better way to solve the problem than to shut off the supply from a part and allow the rest to use the gas in an unrestricted manner.

The respondent sets up the plea that it is dealing with an article of interstate commerce and that consequently the State of New York has no control over its action except perhaps in safety matters. In other words the respondent is inclined to admit that the State of New York has control over its actions in matters where the police powers of the State are involved. If the protection of a village of from 2500 to 3000 inhabitants in its supply of fuel for heating and cooking during the period of our rigorous northern climate is not a legitimate subject over which the police power of the State may be exercised, it is quite apparent that the scope of those powers is extremely limited. Under the Public Service Commissions Law this Commission is given general jurisdiction over gas companies and by subdivision 5 of section 66 of that law it has power "to see that their property is maintained and operated for the security and accommodation of the public".

The status of the respondent as an agent of interstate commerce where the subject of rates is involved is now under consideration in the courts, and with the final decision both

this Commission and the interested parties must be content. It may be interesting to observe, however, that the Gas Company and other companies which obtain their supply of gas wholly or in part beyond the state line seek the protection of the laws of the State of New York when they file their schedules of rates pursuant to the laws of this State. They depend upon the protection of these laws when they collect their bills, but when these rates or any proposed increased rates are attacked then they claim they are only subject to United States law.

The franchise granted to the Gas Company by the Village of Falconer is not for any definite period of time and the Gas Company does not agree to supply the village for any certain number of years, but we have the right to infer that it was the intention of the parties that the contract should be of a permanent character.

It can not be presumed when we consider the subject of the agreement that it was intended either by the village or by the Gas Company that the supply of gas might be peremptorily discontinued at any time. At least a fair and reasonable notice was contemplated. It would not be presumed that the Gas Company would expend the sums to lay its pipes throughout the village and that the inhabitants would pipe their houses unless they had in view the permanent continuance of the service. The village contains about 800 houses, all or nearly all of which are fitted for the use of gas. What factories and business use the gas does not appear.

In *Booth v. Cleveland Mill Co.* 74 N. Y. 15 at p. 21 we find these words: "If from the text of an agreement and the language of the parties either in the body of the instrument or in the recital or references there is manifested a clear intention that the parties shall do certain acts, courts will infer a covenant in the case of a sealed instrument or a promise if the instrument is unsealed for non-performance of which an action of covenant or assumpsit will lie". See

246 PUBLIC SERVICE COMMISSION, SECOND DISTRICT
P.S.C. 2d D.

also *New England Iron Co. v. Gilbert El. R. R. Co.* 91 N. Y. 153.

In *Russell v. Allerton*, 108 N. Y. 288 it is held that when there is any doubt as to the meaning of a contract it will not be so construed as to place one party wholly at the mercy of another.

It should also be remembered that when an instrument in which the public has an interest is to be construed and there is any doubt as to the meaning, that construction must be in favor of the public.

The Gas Company should not be permitted to wholly shut off the supply of gas from Falconer, but may be permitted to shut off the supply from certain classes of customers, and to limit the amount supplied to others.

All concur except Commissioner Cheney not present.

In the Matter of the Complaint of HORSEHEADS TRANSPORTATION PROTECTIVE ASSOCIATION ET AL. *against* ELMIRA WATER, LIGHT AND RAILROAD COMPANY as to proposed increased fare. [Case No. 6471.]

Where a long established city flat rate of 5 cents has been in operation in a city and its outlying districts, suburban and interurban in character, a proposed schedule increasing rates, using the city line regardless of distance or population as a zone boundary, may be unjustly discriminatory.

A zone system allowed which includes the immediately suburban districts in the flat city rate and increases rates to and from the districts interurban in character.

Decided September 19, 1918.

Appearances:

Mortimer L. Sullivan, Elmira, N. Y., for complainants and Town of Southport.

Thomas A. Wickham, Elmira, N. Y., for residents of the town of Elmira.

H. L. Gardner for Business Men's Association of Elmira Heights and for the Town of Veteran.

Stanchfield, Lovell, Falck and Sayles, Elmira, N. Y. (by Ross M. Lovell), and M. G. Bogue, 61 Broadway, New York city, for respondent.

FENNELL, Commissioner:

There are two vital questions in this matter. Does the company need additional income from increased trolley rates to enable it to render satisfactory service? Is there unjust discrimination in the proposed increased rates?

The question of necessity can best be answered by stating what the company is legally entitled to receive from its railroad operations, and then stating what it is actually receiving from such operations.

248 PUBLIC SERVICE COMMISSION, SECOND DISTRICT

P.S.C. 2d D.

A public utilities company is entitled to receive a fair return on the value of the property used in the public service, making due allowance for the natural "wearing out" of the property and obsolescence. To keep a trolley system fit for good service requires that a sum be set aside from earnings each year with which to meet these two factors of destruction as the years go by. Without such a policy adopted and sanely applied the final physical and, therefore, financial wrecking become as certain as the result of a definite mathematical problem. A depreciation reserve must be created to care for and balance such depreciation. The rates for service must carry this annual charge, just as such rates should also carry an annual return to the owners of the property used in the public service. The public in paying rates is not to pay enough to make a fair return on the capitalization of a company but on the actual value of the property used. This value may be found by appraisal. It may be determined also by the actual investment in the property: that is, the legitimate cost of the property. The records of the Public Service Commission (cases Nos. 4212 and 5357, June, 1916) show a detailed inventory and appraisal made by the company and checked by the Commission's engineers and accountants. These figures not having been questioned, they may for the purposes of this case fairly be used as investment cost.

The total for the entire physical property of this company is \$6,053,759. The amount assigned to the railroad department, \$1,911,476, does not include any part of an allowance of \$1,000,000 for intangible capital undistributed between departments which is included in that total. The accrued depreciation of the railroad property, as agreed upon in case No. 5357 and as modified by transactions since that time, June, 1916, is \$291,072. Deducting this from the railroad investment gives \$1,655,635.

The following tabulation shows the condition of the railroad department of the company as of May 31, 1918:

HORSEHEADS, ETC., v. ELMIRA W.; L. & R. R. Co. 249
 Vol. VII.

ELMIRA WATER, LIGHT AND RAILROAD COMPANY

	All Departments	Railroad Department
Fixed capital December 31, 1917, as per company's report to P. S. C.	\$6,053,759	\$1,911,476
Working capital (materials and supplies, and cash) December 31, 1917, as per company's report to P. S. C.	\$111,569	
Railroad department's proportion of working capital, assuming the same ratio as for fixed capital, about 32%		35,231
Railroad investment, fixed and floating capital.		\$1,946,707
Depreciation reserve on railroad property December 31, 1917.		291,072
Possible rate base.		\$1,655,635
Railroad revenues year ended May 31, 1918.		\$470,369
Railroad expenses year ended May 31, 1918.		387,214
Railroad operating income year ended May 31, 1918 (case No. 6471, respondent's exhibit No. 5).		\$83,155
Rate of return on above rate base.		5.02%
Bonded debt December 31, 1917.	\$3,951,000	
Railroad department's proportion of bonded debt, in ratio of fixed capital investment, 32%.		\$1,264,320
5% interest on bonded debt.		\$63,216
Available for dividends, surplus, or other purposes (\$83,155 - \$63,216).		
Capital stock December 31, 1917.		\$19,939
Railroad department's proportion of capital stock in ratio of fixed capital investment 32%.	\$3,600,000	
Ratio of amount of railroad income available for dividends, surplus, etc., to capital stock apportioned to railroad department.		\$1,152,000
		1.73%

Company's exhibit No. 5 in this case contains the following estimates:

ADDITIONAL REVENUE, ESTIMATED

As Result 1-cent Increase

Estimated Additional Revenue as follows:	
Elmira Heights and Horseheads, Horseheads division.	\$3,440
Elmira Heights and Horseheads, Elmira Heights division.	4,560
West Water street and Roricks.	5,677
Pennsylvania avenue, Southport.	920
Seneca Lake division.	\$14,597 9,213
	<u>\$23,810</u>

Expenses to be met:

Increased fuel cost.	\$17,000
Increased labor cost.	14,575
Increased taxes, franchise.	1,200

\$32,775

It will thus be seen that the company estimates that its increased expenses will be greater than its increased earnings by \$8965. Deducting this amount from \$19,939, the amount available as of May 31, 1918, for dividends, surplus, etc., we find a balance of only \$10,974 as the profits of this company out of its investment in railroad property and its operation of the same. Even if the company's estimate of

additional return from the 1-cent increase is low and its estimate of increased expenses is high the amount of margin is so small that, with the present tendency towards steadily mounting costs and the probability of a continuance of cost increase, the margin will in all probability be entirely wiped out.

There should be considerable difference in the handling of cases where companies are endeavoring to obtain a "fair return" and cases where they are endeavoring to meet their fixed charges and maintain service without asking for any return in the form of dividends.

It is true that utilities companies must expect to share the unusual burdens of these emergency war times, but the public must remember that "sharing the burden" does not mean that the utilities companies should carry it alone by operating below cost. Transportation and other public utilities are vital to the people; more so in these times than ever before. They must not be permitted to break down; they must be kept on their feet; returns must equal costs. Public utilities perform part of the public service and therefore must be kept intact and in operation for the public benefit. "Sharing the burden" will probably mean higher rates to the public and lower profits or no profits to the companies.

Of course it must be understood that rates fixed under these emergency conditions, and without the usual long contested and expensive rate case appraisal and carefully investigated conditions, are fixed for not longer than the period of the war and are subject also to change in the meantime by order of the Commission upon proof of changed conditions.

It is contended that the proposed increase of 1 cent beyond the city limits of Elmira is unjustly discriminatory against those living beyond the city limits because it increases only those beyond and not those within.

The answer to the question of unjust discrimination should be found in the rights of travel which a passenger

receives upon payment of his fare rather than the distances actually traveled on various car lines from the end of the lines to the common center of traffic.

Rates are divided into two general classifications: one based upon mileage, the other a flat rate usually of 5 cents within the boundaries of municipalities and their immediate suburbs. The rate is to be paid for a long or a short haul, but the passenger has the right upon payment of his fare to take the long haul. Of course, strictly speaking, this is clearly inequitable to the railroad company as well as to the passenger. In large cities one person travels ten miles for 5 cents on the same car that a fellow passenger travels 10 blocks for the same fare. It is clear that the 10-mile passenger has been carried below cost by the company and the company has carried the 10-block passenger at greater than a fair profit. But it has been found from experience in the development of the traffic systems of the various municipalities that the flat rate for municipalities works out in the long run to the greatest good for the greatest number. Such a flat rate tends to prevent overcrowding in the thickly populated centers of the city and to spread the people toward the outer edges and into the nearer suburban districts. This condition is beneficial for the whole community, both on the economic and the civic side. It prevents congestion of population in those districts of the city where closely crowded buildings, including commercial and industrial establishments, make necessarily for unpleasant, unhealthful, and uneconomic living. The cheap fare for the long haul permits men who work in the thickly built up portions of cities to have their homes in the outlying districts where living conditions are much better for their families and where land is not so valuable as to preclude their having enough of it in connection with their homes to have gardens, and thus help reduce their cost of living. This condition is made possible only by the low fare for the long haul, and while this is apparently inequitable to the railroad for the

long haul and to the short haul passenger, nevertheless it has brought about a tremendous step in advance in the living conditions in American cities, and has become a well established and satisfactory custom.

Trolley service is absolutely necessary in a modern city. If the trolley fares were measured by the distance traveled, the natural result would be an endeavor on the part of trolley users to keep as close to the center of the municipality as possible to save the considerable monthly expense caused by the increased rates in the outer districts, which increased rates for a whole family would be very considerable. This would lead to congestion in population and higher rents in the congested center. Another effect would be the curtailment of the use of trolley lines in the outer parts of the city and the consequent limitation of extension of lines. These results would be interwoven with each other and both would be bad.

This theory of the small fare for the long haul, balanced by the same fare for the very short haul, usually does not apply to interurban lines except in those portions which are immediately suburban. Where the passenger goes by trolley from one community to another there is not the same reason for the low fare for the long haul as where he goes from his work in the center of a given community to his home in a suburb and returns therefrom to his work. Suburban travel enlarges the size of a community and helps bring about benefits above indicated, whereas interurban travel, from one community to another, has no such effect. Therefore, there is not the same reason to have the short haul pay the flat rate for the benefit of the interurban passenger that there is for the benefit of the suburban passenger.

And of course there must be some limitation as to the length of the long haul even when it reaches to the suburban district. This limitation will vary with every community and its particular traffic problems which have to do with distances, grades, population, etc.

Now if we assume, for the sake of argument, that the present 5-cent rate in Elmira, which includes Elmira Heights, Southport Corners, Clark's Glen, and Center Mills is the kind of flat rate which has become established as above mentioned, and that the localities it serves are of the nature above described, then any increase such as proposed might be regarded as unjustly discriminatory. However, it can hardly be claimed that the Elmira-Horseheads traffic is suburban. It is rather interurban, which is also true of the Elmira Heights-Elmira traffic except for those passengers on both lines who live just beyond the city limits, of whom there are comparatively few.

The West Water Street line has the suburban and interurban characteristics. Quite a number of people live near the city line, but the trolley service reaches all the way to Rorick's Glen and Clark's Glen, a considerable distance beyond the city suburban district. The service is not only for the suburbanites who would be served by a short line running out from the city, but the service must necessarily be maintained clear through to the end of the line, and it might reasonably be said that the service near the far end of the line ought not to be charged against the city of Elmira as being really suburban to it. There might well be a line of division between a 5-cent and 6-cent zone farther west on Water street than the city line, which would place in the city 5-cent zone the residents who are immediately suburban to the city.

The Southport Corners line is also more nearly suburban in character; it is a short line, extending only 2200 feet beyond the city limits.

The discrimination against the traffic outside the city limits is more apparent than real. The city passenger pays 5 cents for a ride anywhere inside the city, with transfer rights to take him from any part of the city to any other part. The passenger may use only one line to the common traffic center, but he has the right to transfer at that point

254 PUBLIC SERVICE COMMISSION, SECOND DISTRICT

P.S.C. 2d D.

to any other part of the city, and the company must maintain regular service on all its lines at all traffic times to meet the requirements of passengers, whether transferees or otherwise, and whether or not the lines are used. The passengers from Elmira Heights, Horseheads, Rorick's Glen, or Clark's Glen get exactly the same rights as the city passengers in the city, and in addition the haul between their communities and the city and its immediately suburban districts. The additional hauls are by the proposed rate made for 1 cent. This is not regarded as unjustly discriminatory in view of the nature and length of the extra hauls.

The proposed increase of 1 cent on the Horseheads, Elmira Heights, Rorick's Glen, and Clark's Glen routes is reasonable and should be allowed.

The Southport Corners line and that portion of the West Water Street line immediately suburban to the city should for the reasons above mentioned and because of the short haul to the business center, be treated as portions of the city lines and have the same rate.

The short distance on the Elmira Heights line between the corporate limits of the city of Elmira and the corporate limits of the village of Elmira Heights should be included in the 5-cent city zone.

The 6-cent rate between Elmira and Elmira Heights on the Elmira Heights line should be balanced by a 6-cent rate instead of an 11-cent rate on the Horseheads line between Elmira and some point about opposite 14th street.

This opinion is accompanied by an order setting forth a tentative schedule and providing that a new rate schedule conforming substantially to the one suggested may be filed and become effective on short notice.

All concur except Commissioner Cheney not present.

Petition of Cohoes Power and Light Corporation, Cohoes Company, and Cohoes Gas Light Company for authority to transfer properties, etc., to make a mortgage for \$5,000,000, to issue now \$2,500,000 of 6 per cent 10-year gold bonds and \$2,500,000 common capital stock.
[Case No. 5806.]

Where an ancient hydraulic power installation is converted into a modern hydro-electric plant and combined with an electric lighting property with the result of more than doubling the output of energy, the operation covering a period of six years, the equivalent of 16 per cent on the cash involved was, under the particular circumstances of the case, allowed the projectors as a part of the capitalization for risk over and above actual cost and purchaser's efforts and outlay in consultation and supervision.

Decided September 19, 1918.

BY THE COMMISSION:

The Cohoes Power and Light Corporation is a domestic corporation organized in November, 1916, under the Transportation Corporations Law, with an authorized capital stock of \$5,000,000. The company has not yet begun operations, and none of its stock has yet been issued, nor has it incurred any obligations. The purpose of its organization was the acquisition by it of the plants, properties, water rights, and franchises of two existing domestic corporations, namely, Cohoes Company and Cohoes Gas Light Company. The Cohoes Company was created a corporation by special act of the Legislature of the State of New York known as chapter 90 of the laws of 1826, pursuant to the authority of which it completed in 1831 and has ever since maintained a dam across the Mohawk river above the great Cohoes Falls, together with a system of canals for the development of hydraulic power; it also purchased and still owns the lands on both sides of the Mohawk river which entitle it to use the waters thereof as riparian owners, and other adjacent

lands upon which manufacturers under long term leases covering both the land and the right to the use of water have constructed and operated large and important manufacturing plants such as iron foundries, knitting mills, axe factories, cotton mills, hosiery mills, rolling mills, and other industries. The practice has been to make a 999-year lease of the land, granting to the lessee also the use of a specified amount of water from the canal system.

The Cohoes Gas Light Company is a domestic public lighting corporation, organized in 1852, engaged in the business of manufacturing and distributing gas for lighting purposes, and in the distribution of electricity for light, heat, and power purposes in the city of Cohoes and surrounding towns. For more than sixty years these two companies have operated in the same territory and are closely affiliated, the majority of the capital stock of each being under a common ownership and control. Both generating stations of the lighting company are located on lands of the Cohoes Company and have been operated by water power furnished from its canals. It is obvious that on the completion of the substitution of electric energy for water power a much more satisfactory service can be rendered to the patrons of the lighting company by reason of the greater steadiness and continuity of the power supply aside from the more important economic advantages which will be secured.

In the year 1911 Mr. Anthony N. Brady conceived the idea of acquiring the two properties, discontinuing the application of the water through canals directly to the wheels and machinery, and substituting for the old system a central modern hydro-electric plant which would generate electric current for the hydraulic power in one plant, and distribute the current to the various users. It was estimated that running with a load factor of 40 per cent, the available water with a necessary steam auxiliary was capable of generating in the modern plant 78,840,000 kw.h. per year, of which 30,000,000 kw.h. would do the work which the entire

development had been doing under the old methods and do it better, leaving the remainder for use in other directions.

The plan was carried out through the purchase by Mr. Brady, and after his death by his estate, of substantially all of the stock of the two companies, viz.: 11,876.8 shares of \$100 each out of a total of 12,000 shares of the Cohoes Company, and 8750 out of a total of 10,000 shares of the lighting company. These purchases were made for cash in the open market without commissions or brokerage. The cost of the Cohoes stock, including compound interest at 6 per cent per annum on the outlay from dates of purchase to December 31, 1917, and deducting dividends, has been \$1,864,162.13, and the cost of the entire 12,000 shares upon this basis would be \$1,883,498.40; computed in the same way, the cost of the lighting company shares has been \$710,-828.01, and the cost of the entire 10,000 shares upon this basis would be \$812,375.

The enterprise was then vigorously prosecuted to completion, and seems to have met the expectations of its owners. The control of the water which had been parted with under the long term leases, about thirty-one in number, has been secured by negotiations with the lessees through which their water rights were surrendered in consideration of what was considered by the parties an equivalent supply of electric energy. The monetary return from this current, viz.: a total of about twenty-seven million kw.h. per year, is about one-half cent per kw.h., leaving about forty million kw.h. per year for disposition elsewhere.

The new plant was constructed by the Cohoes Company itself without the interposition of construction contracts, commission men, or brokers, all costs being paid in cash as they were incurred. These payments were made either out of net earnings which were not distributed as dividends or out of advances which the Brady estate made to the company between January 1, 1912, and December 31, 1917, to the amount of \$1,122,987.32. The acquisition of the stocks

above mentioned took place at a time when there was an outstanding mortgage indebtedness against the property in the amount of \$350,000 which was assumed by the purchasers and is to be retired, thus increasing the investment by that amount.

In addition there was expended by the lighting company during the 5-year period mentioned in replacing apparatus used by consumers, which should properly be credited as an item of development cost incident to the new hydro-electric installation, the sum of \$40,000, while a bill for \$24,000 covering legal services over a period of years will be paid by the owners of the stocks of the old companies. There is also found to exist an excess of floating assets at December 31, 1917, over like assets December 31, 1911, amounting to \$81,017.48.

Assuming that the few minority shares of stock in the old companies are of equal proportionate value with those which were acquired, we thus have the equivalent of a total cash investment in the property by the present owners as of December 31, 1917, of \$4,313,878.20, as against which there are liabilities to be assumed of \$5155.29.

The newly organized Cohoes Power and Light Corporation now proposes to take over all the property and franchises of the two older corporations as of the date last named, free of all indebtedness except the floating debt of \$5155.29, and to pay therefor the sum of \$5,000,000 in its own securities, viz.: \$2,500,000 of its first mortgage 10-year 6 per cent bonds at par, and \$2,500,000 of its common capital stock.

There would seem to be no doubt of the wisdom and desirability of the development which has been made; antiquated methods of developing, applying, and distributing hydraulic power have been superseded by new and much more productive methods, and a substantial addition to the power output of the property has been accomplished, it appearing that the output of energy from the available water has been more than doubled. It is necessary to consider,

however, whether or not the property proposed to be acquired by the new company is fairly and reasonably worth the amount proposed to be paid for it. It will be observed that the investment shown above represents in part actual cash cost of physical property, and for the remainder what may be considered the market value of physical property, franchises, and good will, because the stocks purchased in the market were the equivalents of those items. This market cost, however, included certain property which will not be used or useful in the public service, and also included the franchise of the lighting company. The Commission has therefore examined the books and records of the old companies, which disclose that as of the date mentioned the actual cash cost of all of the assets has been \$3,516,142.21. These records run back nearly one hundred years, however, and while they were remarkably well kept for the times, certain substantial items of cost which would be reflected today in a set of records which had kept abreast of the advance in accounting science are missing. Among these cost factors may be mentioned organization, engineering and superintendence, law expense, interest and taxes during construction, and miscellaneous construction expenditures. A large part of these cost figures would seem to have little bearing on the question of value, however, by reason of their great antiquity, and undoubtedly many of the most important items reflect but a fraction of present values. Neither does it seem worth while to insist upon an expert valuation of the physical property involved, for the reason that any such valuation would be largely based upon individual conjecture as to the water power upon its earning capacity and as to the whole property upon a comparison with what other like properties may have cost, the latter basis eventually going back in large measure again to the earning power. The Commission has all the evidence which can be produced as to the earning power, and can itself apply that measure of value to the degree that it is proper to give it consideration.

260 PUBLIC SERVICE COMMISSION, SECOND DISTRICT
P.S.C. 2d D.

The examination made by the Commission discloses that approximately \$1,000,000 of the original cost of the physical property is represented by property which has been superseded in the new development, and will not be used or useful in the public service. It was necessary to take and pay for it, however, in order to acquire the old plants, and while it will be superseded it does not follow that it is valueless because in part it consists of canals and other real property which may prove eventually to be of substantial value. We think it only fair to consider also that the property was acquired and the new development made during a period when much lower prices prevailed than are current today. Applying the test of earning power, we find the present companies have an actual experience of six months ended June 30, 1918, with the modern plant. These earnings are based on moderate prices for the output, viz.: for electric lighting $7\frac{1}{2}$ cents maximum per kw.h.; for gas \$1 per M cubic feet maximum; for power $\frac{1}{2}$ cent per kw.h., and (estimated) 1 cent per kw.h. These figures, with a 45 per cent operating expense, show total net earnings of \$425,029.28, equal to approximately $8\frac{1}{2}$ per cent on the proposed purchase price.

Following this scrutiny of the proposition, the Commission is satisfied that the expenditure of \$4,313,878.20 was necessary for the accomplishment of the project, and that except for the superseded property the expenditure represents at least the equivalent which it would have cost to purchase the physical property at the time the conversion took place, and before the present era of unusually high costs; by the adoption of these figures no franchise will be capitalized contrary to the statute. In opening the books of the new company the item of \$1,000,000 representing superseded property should be set up as intangible capital and should be treated as such in the future financial transactions of the company.

There is a request in the petition that we allow a com-

pensation for "risk over and above actual cost" of \$323,504, and for "purchaser's effort and outlay in consultation and supervision over a period of six years" of \$404,000. If we allow for these two items \$691,277.09, the desired capitalization will be made up. It is fair to consider that the development has demanded and received, over the period named, a large expenditure of foresight, judgment, skill, and application on the part of the owners which is not included in any of the figures representing actual cash outlay. The difference between the actual investment and the \$5,000,000 asked is about 16 per cent of the actual cash. The evidence shows that a commendable practice was followed by eliminating contractors' profits, commissions, bonuses; and by the payment for materials and services on a strictly cash basis. It appeared also that the engineering and financial organizations of the Brady estate were freely drawn on for their services during the entire period of construction for which no charge was made. Considering the entire circumstances, the period of time consumed and the character of the development, we feel that an allowance of \$691,277.09 is not exorbitant and can reasonably be made.

Petition (or Complaint) of SYRACUSE AND SUBURBAN RAIL ROAD COMPANY under subdivision 1, section 49, Public Service Commissions Law, for permission to increase fares. [Case No. 6523.]

When it appears that the probable revenue to be derived from an increased rate schedule proposed to meet conditions arising out of the present war will not more than meet increased operating expenses and fixed charges, it is not necessary that a careful valuation of the property used in furnishing the service should be made; it is sufficient for the purpose of determining the application that it appears that the value of the property is at least equal to the amount upon which the fixed charges are calculated.

Such a valuation is not to be considered as a precedent in any future rate case involving the same property.

Decided October 1, 1918.

Appearances:

Gannon, Spencer & Michell, Syracuse, N. Y., for the petitioner; *Stewart F. Hancock*, Corporation Counsel, for City of Syracuse; *William L. Huber*, Scottholm, Syracuse, N. Y., in person.

Theodore L. Poole, De Witt, N. Y., for himself and other residents of the town of De Witt.

CHEENEY, Commissioner:

The petitioner in this matter operates a suburban road from about the center of the city of Syracuse to and through the incorporated villages of Fayetteville and Manlius to the terminus of the road at Edwards Falls, a mile or so beyond Manlius village. A branch of the road extends from the hamlet of De Witt to the hamlet of Jamesville, the total mileage being about fifteen miles. But little of the business done is city business, as the territory served in the city also has the service of the local lines with transfer privileges, and the competitive line does the greater share of the busi-

ness. Practically no local riding is done in either of the villages of Fayetteville or Manlius, although the residents of those villages use the road for the longer distances. The character of its business indicates that its tariff schedules should be built upon the interurban basis rather than upon the urban, but in view of the fact that considerable of the mileage is located in the city and those villages, section 181 of the Railroad Law prescribing the maximum of rates in cities and villages must be complied with unless otherwise ordered by the Commission.

Accordingly the railroad company presented its complaint alleging that the rates, fares, and charges charged by it are insufficient to yield a reasonable compensation for the service rendered, and are unjust and unreasonably low, and do not allow a sufficient average return upon the value of the property actually used in the public service after providing for surplus and contingencies; and asks that notwithstanding the provisions of section 181 of the Railroad Law the Commission determine the just and reasonable rates, fares, and charges in force, and permit an increase in the rate of fare charged by the petitioner in cities and incorporated villages above 5 cents.

An examination of the different municipal consents under which the petitioner operates discloses that none of them attempt to fix rates of fare. The City of Syracuse was represented at the hearing, but none of the other municipalities appeared although due notice was given. Certain patrons of the road appeared at the hearing but made no objection to the proposed schedule of increased rates.

The evidence shows that the operating revenues of the company for the year 1917 amounted to \$151,167 and the operating expenses \$98,168. Included in these expenses was only the sum of \$3020.75 to provide for depreciation during the year, which is manifestly an inadequate sum when consideration is had of the amount of property actually used in the service. The taxes paid were \$11,753, leaving total

operating income of \$41,246. To this should be added the total non-operating income \$72, making gross income \$41,318. The interest on funded debt was \$27,650, other interest and rent deductions \$7738, leaving a net corporate income for the year of \$5930. It also appears that the operating expenses for the year 1918 will be very largely in excess of those of the year 1917. Increases in wages of its operators already granted and promised amount to \$9900, and the increased cost of operation by reason of the high prices of materials will be from \$4000 to \$5000. The record of operation for the first six months of the year 1918 shows that the travel has fallen off and there is no reasonable expectation that the income from operation for the year 1918 will equal that of the year 1917. The company has not in the past been in receipt of an undue revenue, as the record of dividends paid shows an average rate of but .67 per cent for the whole twenty years the road has been in existence, and the corporate surplus at the end of the year 1917 amounted to but \$45,000. Upon this showing it is evident that an increase in revenue is absolutely required in order to enable the company to meet the increased operating expenses to which it will be subjected in the present year.

The petitioner has presented with its petition a proposed tariff which it asks to have approved as the rates and charges to be charged by it and which is based upon a rate of 3 cents per mile for cash fares, $2\frac{1}{2}$ cents per mile for ticket fares, 2 cents per mile for mileage book rate, with a minimum fare of 6 cents for each class, and $1\frac{1}{2}$ cents per mile for commutation rates. A computation of probable revenue to be derived from the new tariff, based upon the assumption that the travel in the future will remain the same as the travel for the year 1917, has been submitted. This computation shows a total possible increase in revenue from the proposed rates of \$24,000. It is not probable that the travel will increase or even remain the same as in the past. The records of the company for the first half of 1918 with the present rates

Vol. VII.

in force show a falling off in travel to a considerable extent, and it is probable that this company will experience the same result as have other companies which have put increased rates in force, which is that the volume of traffic will decrease so that the income return will not be in direct proportion to the rate increase. The company estimates that it will realize about 60 per cent of the maximum, or a total increase of \$14,000. From the evidence before the Commission in other cases, and the knowledge which it has of the results realized from increased fares in other localities, it would seem that this assumption is a reasonable one, and that no greater increase of revenue can be expected should the proposed tariff be put in force. The increases in operating expenses already mentioned will absorb all of the increased revenue if no more than the amount of this estimate is realized. In addition to that, prudent management requires that there should be set apart from the revenues derived a larger sum above what has been set aside by the company in the past to provide for depreciation and renewal of the property in use.

The company is also called upon to make in the next year very considerable expenditures in the improvement of its track and equipment, including the rebuilding of portions of the track and a considerable amount of paving on account of public work now under construction along its lines, and it has already been permitted by an order of the Commission to issue capital securities for the purpose of realizing funds to perform this work. These capital issues already authorized by the Commission will increase the fixed charges of the company about the sum of \$5500. It is therefore apparent that even if the maximum return indicated by the 1917 traffic should be realized from the increased fares provided for in the proposed schedule of rates, the whole amount would be required for increased operating expenses, increased fixed charges, and a proper reserve for depreciation and renewal; and that there can be no promise or hope even that

there will be available therefrom any amount which could be used as dividends to stockholders.

Under present conditions it does not appear to the Commission that it will be feasible to put into effect a tariff which even theoretically would give an adequate return on capital actually used in the service, and during the continuance of the war the company should be satisfied if it is in receipt of sufficient funds to enable it to meet operating expenses and fixed charges.

This situation makes it hardly necessary that a valuation of the property used in the service should be made, and the effort of the Commission has been directed only to ascertaining whether that valuation at least equals the amount of the interest bearing indebtedness. As no adequate valuation has been made or attempted, the figures used for the purpose of determining this proceeding will not be considered as binding in any future rate case prosecuted in normal times and under normal conditions.

Evidence has been given of an appraisal of the property of the company used by it in rendering the service amounting to \$1,134,272.62. Included in this is an inventory of tangible property amounting, at unit figures based upon prices prior to 1914 when the present abnormal rise in values began, to \$714,952.82. We do not desire to approve the basis adopted in this appraisal for the additions to inventory figures to take care of contingencies and omissions, taxes, insurance and interest during construction, and other intangible items. This is especially true in regard to the item of bond discount, which clearly can not be allowed, as that item under accepted accounting practice should be amortized out of return on capital. But some allowance should be made for these items, and without going particularly into the matter, it may fairly be said that for rate purposes a valuation of \$900,000 would be justified. The amount of the funded debt permitted to be issued under the recent order of the Commission is \$775,000, which includes

\$50,000 for new improvements and \$20,000 for working capital. It then appears that the amount of the interest bearing securities outstanding does not equal the valuation of the tangible physical property used in the service plus the working capital.

The most troublesome question in this case arises by reason of section 181 of the Railroad Law, which prescribes a maximum fare of 5 cents within the limits of an incorporated city or village. It is now well settled by the judicial construction of this section and of the Public Service Commissions Law that this law does not limit the power of this Commission to fix the rates of fare that may lawfully be charged by a railroad, although the railroad can not fix a higher rate than that contained in the statute without an order of the Commission. While the power exists in the Commission, it ought not to be exercised unless it appears that tested by the rules ordinarily employed in rate cases the statutory rate is unjust and unreasonable. In determining that question the statute rather makes the municipality the unit, and in the ordinary case where the operation is wholly within the municipality or the operation out of it is only incidental, this method can be followed. The difficulty in this case arises from the fact that almost the whole operation of this road is suburban and the municipal operation is only incidental. While about two miles of the road is within the city of Syracuse, there is but little local travel on account of the competition of other lines offering greater facilities. The length of the lines in the villages of Fayetteville and Manlius is so short that there is scarcely any travel between any two points in the respective villages. But owing to the fact that the basis of the cash fare in the proposed schedule is 3 cents per mile, with a minimum of 6 cents, there is a possible violation of the section in the case of all through passengers carried in Syracuse and any local passengers that may be carried in Syracuse, Fayetteville, or Manlius, unless the Commission so orders.

It is practically impossible to segregate the account of revenues and operating expenses, or even the fixed investment used for the local business from that applicable to the suburban business, as the same equipment is used for all, the local and suburban passengers being carried on the same cars, and there is no distinctly local operation. The investment in tangible physical property within the city of Syracuse, consisting of pavements, rails, ties, poles, wires, etc., amounts to \$118,917.82. In these figures nothing is included for intangibles, nor does this amount include anything for cars or other equipment, nor any portion of the cost of the power plant. The evidence is that the revenue from the strictly city business, that is from passengers carried from one point to another in the city, is approximately \$7000 per year, a very small proportion of the total passenger revenue. As it must be evident that the city operation is more expensive than the suburban when consideration is had of the more costly construction of the plant used, the slow speed, and the more frequent stops, it may be fairly said that any conclusions reached as to the rate of return for the system as a whole would apply at least in the same proportion to the city operation were it possible to get at the exact figures. As already demonstrated, the present fares for the whole system do not provide a fair return, neither is it probable that the revenue to be anticipated from the proposed new tariff will more than meet operating expenses and fixed charges; and a finding of the same facts with regard to the city operation is warranted.

All concur.

In the Matter of the Complaint under section 71, Public Service Commissions Law, of CUSTOMERS OF THE NEWFANE ELECTRIC COMPANY *against* NEWFANE ELECTRIC COMPANY as to price charged for electricity. [Case No. 5763.]

A public service corporation is governed by special laws and is subject to control by the State: all of its customers of the same class are entitled to the same rates and the same treatment, and no contract can be made with one consumer which gives a preference or an advantage which all do not receive although such consumer may have brought the public service corporation into being, and made it efficient, and prolonged its life by financial assistance.

Decided October 3, 1918.

Appearances:

Clinton K. DeGroat, Esq., attorney for Newfane customers; *Roy H. Ernest, Esq.*, attorney for Olcott customers; *Messrs. Stockwell and Campbell*, attorneys for Newfane Electric Company; *H. C. Hopson, Esq.*, associated with Messrs. Stockwell and Campbell.

BARRITE, Commissioner:

This is an application by customers of the Newfane Electric Company living in the villages of Newfane and Olcott in the county of Niagara, New York, for an investigation of the charge for electric service by the Newfane Electric Company, pursuant to schedules filed by that company with the Commission. The Electric Company is an offshoot and what may be properly called a protégé of the Lockport Felt Company, a private business corporation evidently prosperous and of considerable financial strength. The Electric Company is the result of a natural growth. The Felt Company was producing electricity for its own use. One or more persons desired light. This was fur-

nished by the Felt Company and the business gradually increased until in the neighborhood of five hundred customers are supplied with light or power. These include domestic users for light, either during the entire season or for the summer months; users of power; and the public authorities for street lighting. The lines extend into the villages of Newfane and Olcott, the hamlet of Burt, and to a small extent into the surrounding country.

The Electric Company was incorporated in November, 1901, with a capital stock of \$1000 which was afterward increased to \$40,000. Of this amount only 13 shares have been issued, 10 of which are owned by the Felt Company and the other 3 by gentlemen who each own one.

The evidence of the respondent company, which composes the greater part of the 832 typewritten pages, is very unsatisfactory as a basis upon which to name a reasonable charge for current furnished by the Electric Company. No set of books was kept by the company until July 1, 1908. The general manager of the Felt Company has acted as secretary and treasurer of the Electric Company and also as purchasing agent. He testified that while one-third of his time was devoted to the Electric Company only \$372 of a salary of \$3672 was charged to that company. The bookkeeper who formerly cared for the books of the Electric Company drew a salary of \$15.50 per week, of which \$1 was paid by the Electric Company. The present bookkeeper who cares for the books of both companies receives \$100 per month paid entirely by the Felt Company. Whenever any work has been done or repairs made by the Electric Company workmen of the Felt Company have been employed and no record made of their time or the worth of their services.

In October, 1911, the two companies made a contract by which the Felt Company rented to the Electric Company all of its property used in the production and transmission of light, heat, and power, together with the use of buildings

for a period of 20 years. In return the Electric Company agreed to furnish the Felt Company with all the light, heat, and power it might require during that period; the light and heat were to be without charge, power to be 2 cents per kw. In addition the Felt Company was to have all the surplus exhaust steam of the Electric Company, which as matter of fact was all of the exhaust steam. Another provision of the contract provides that the Felt Company shall have the right to buy the stock of the Electric Company so that the Felt Company may always own at least 51 per cent of the stock. The Felt Company also used considerable quantities of live steam from the Electric Company for the purpose of drying felt. The general manager of the company introduced in evidence a statement of the value of the property used by the Electric Company which shows a value of \$120,868, of which amount \$90,476 represented property bought and owned by the Felt Company. The balance is owned by the Electric Company. This statement shows items amounting in some cases to hundreds, in some cases to several thousands of dollars. The prices were at first understood to be actual cost prices, but a cross-examination showed they were prices estimated from recollection. It was stated the books did not show the cost of the various items, but that the items would be found in the annual reports filed with the Commission. It is hardly to be presumed that property bought by the Felt Company, a private corporation not under the jurisdiction of the Public Service Commission, would appear in the reports of another company to that Commission, and an examination of such reports shows that this assumption is true. It appears by the report for the year 1911 that the accounts of the company were segregated and properly classified by the auditor of the Public Service Commission on the 25th day of May in that year. By that report it appears that the fixed capital of the Electric Company on the 31st day of December, 1908, was \$12,568.21, and that between that day and

December 31, 1911, \$7226.50 in addition was installed, making a total of \$19,794.71.

The report for the year 1917 shows a fixed capital of \$23,807.60, but nowhere in the reports is there any price or valuation of the various items of property owned or used by the Electric Company. The Felt Company claims to have furnished the Electric Company with property to the amount of \$90,776. These figures were afterward modified by striking out one machine which had been sold and reducing the valuation on an automobile used by the company. It does not seem that the position taken by the Felt Company is correct. If that company has not on its books the prices paid for the various items of property furnished to the Electric Company, how has the Felt Company been enabled to know the condition of its own business? If the prices of these various items are not on the books of the Felt Company, then that company and not the public should suffer for its own neglect, and customers should not be required to pay a price for electricity which is founded upon estimates of the value of the property used, made by witnesses whose interest urges them to make as favorable a showing for the company as possible. The report for the year 1917 was filed after the new rates which are the subject of review in this proceeding went into effect, and the business of that year was conducted under these rates. This report shows a deficit for the year from its operations of \$5144.71. It appears that 405,890 kw. hs. of electricity were sold during the year; of this amount 133,130 kw. hs. were purchased at a cost of 1 27/100 cents per kw. h. The balance was produced at a cost of 5 7/10 cents per kw. h., which is an extremely high cost. In 1916 the sum of \$11 was charged for general administration; in 1917 the amount was jumped to \$1146.41. In 1917 the company charges \$1187.22 for general amortization. No amount had been charged in any previous year. Either the report for 1917 was drawn with a view to its influence on the pending rate

Vol. VII.

case or the previous reports are of little value. It is difficult if not impossible for the general public to determine the value of property belonging to public utilities companies, and the reports of the companies themselves as to such value should be investigated with great care when used as a basis upon which to determine the rates which the public must pay.

At the request of the interested parties and upon their stipulation an expert employed by the Commission made an examination of the property owned and employed by the Electric Company in its business and filed his written report. The figures which he makes while only tentative may be considered as fairly accurate. The only protest here is against the regular metered lighting rate. Neither the power consumer, the street lighting interests, nor those who accept the rates for lighting during the summer season make protest. It should not be assumed by what has been said that there has been any intentional wrong-doing in the relations between the Felt Company and the Electric Company, but the relations between the two have been so close and the care exercised in keeping a distinct account of the affairs of the Electric Company has been so slight that the other general customers of the Electric Company may have reason to feel that their rights may have been prejudiced by the close connection of the Electric Company with the private concern. The Electric Company is a public service corporation governed by special laws and subject to control by the State: all of its customers of the same class are entitled to the same treatment, and no contract can be made with one customer which gives a preference or an advantage which all do not receive although such customer may have brought the public service corporation into being and made it efficient and prolonged its life by financial assistance.

It is unnecessary to refer in detail to the report made by the expert of the Commission, which is filed and may be

274 PUBLIC SERVICE COMMISSION, SECOND DISTRICT
P.S.C. 2d D.

examined by those interested. But it may be said that the report shows that the property in service amounts to \$86,600; that the power rate now advanced is unsatisfactory and does not give a proper return; that the commercial lighting rate should be advanced but not to the point desired by the company, and the rate should be identical for all the territory served. The rates suggested by the report are as follows: first 25 kw. hs. per month at 10 cents per kw. h.; next 25 kw. hs. per month at 8 cents per kw. h.; excess over 50 kw. hs. per month at 6 cents per kw. h. A prompt payment discount of 10 per cent and a minimum charge of \$1 per month.

These rates should prevail until and including the 31st day of December, 1919, and in the meantime an accurate and a separate account of all the affairs of the Electric Company should be kept. All customers of the same class should pay the same rate. The Felt Company should pay for all exhaust and live steam used. When the affairs of the Electric Company are separated and an accurate statement of its financial condition may be had, a readjustment of the rates, if necessary, can be made.

All concur.

In the Matter of the Complaint of SAMUEL R. WICKETT AND
OTHERS *against* W. J. JUDGE, owner and operator of
franchises for the distribution of illuminating gas in the
city of Buffalo. [Case No. 6507.]

Decided November 12, 1918.

Appearances:

Donnelly, O'Neill & Lindall for complainants.

Kenefick, Cooke, Mitchell & Bass for respondent.

HILL, Chairman:

The petitioners own property on Montrose avenue in the city of Buffalo, and request the Commission to make an order by virtue of the authority granted to it by subdivision 2, section 66 of the Public Service Commissions Law, directing the respondent, who owns and operates the illuminating gas plant in said city, to make the necessary extensions of his mains and service. It seems that respondent owns and supplies mains in Englewood avenue and in University avenue, the former of which forms a junction with Montrose avenue within one hundred and fifty feet of the property of complainants.

In opposing the application the respondent shows that a natural gas company is operating in the neighborhood, and that five years ago that company interfered with respondent's customers in an adjoining street by inducing them to substitute its product for that of the respondent; and also attempted to show that it is unsafe for respondent to add to his consumers at this time because his present business taxes his production to its utmost capacity; and further, that it is now difficult to obtain labor and material to make repairs, and that extensions now under way together with essential repairs will require all available labor and material during the present year.

The complainants make a very strong case for an extension, it appearing that Montrose avenue is in a rapidly

developing residence section of the city, that housing facilities there are greatly in demand, and that it is impossible to sell or rent houses to advantage unless a gas supply is secured. It appears that Montrose avenue is a short residence street about three blocks long; that upon it are thirty-three families in need of gas, and when houses now under construction are finished there will be sixty-three such families. The builders on this street have clearly outrun the expansion of the necessary public utility facilities, especially that of gas. The respondent in its answer did not question the reasonableness of the request for the extension on the ground of profitableness, but confined its objections to those above set forth, hence it is unnecessary to consider the questions of cost or return on investment.

Inasmuch as the evidence shows that the respondent has recently increased its capacity nearly 50 per cent and made only a nominal amount of extensions during the preceding year, and, as appears by its answer, is now making further extensions, the lack of supply does not seem to be a weighty objection. The shortage of labor is of course general and troublesome, but in this particular case the complainants have offered to supply the labor and assist in supplying the material, and have still been met with refusal.

At the time the requests were made to the company the price of its gas was one dollar per thousand cubic feet; since that time a tariff has been filed pursuant to statute advancing the price nearly 50 per cent. Important light is therefore thrown on the reluctance of the company to make the required extension by the undisputed evidence that the alleged inadequacy of the price prevailing at the time the request for the extension was made was one reason advanced by the company at that time for its refusal. Clearly such objection was untenable. The lawful price then existing is presumed to have been fair, and it is also to be assumed that the complaint now pending against the increased rate will be disposed of on its merits.

VOL. VII.

The fact that the competition of natural gas in a neighboring street five years ago had been found troublesome can not be seriously considered as a defence to this proceeding, especially as it appears that the request of one of the complainants for an extension from the natural gas company on Montrose avenue has been refused. Due respect must be had for the request of the federal government that none but the most necessary extensions of public service facilities should be ordered. In this case, however, it is clear that the company is engaged in making extensions, none of which are shown to be more urgent than that of the complainants herein; and furthermore, the furnishing of housing facilities is one of the urgent government measures. We think it may safely be assumed that the federal authorities do not favor the complete stoppage of extensions such as that now under consideration.

The respondent requests that an order directing the extension, if made, be conditional upon complainants advancing the cost of the main, to be refunded when their gas bills equal the original outlay; and also upon their obligating themselves by bond to continue the use of gas for a definite period of time. It appears that in the anxiety of complainants to induce respondent to make the extension they offered various inducements of this general character, all of which were refused. Assuming that we have the power to impose such conditions, their imposition would be of doubtful justice in view of the fact that complainants are not the sole beneficiaries of the proposed extension. We think the complaint should be disposed of on its merits without regard to any bolstering it might receive by way of such conditions, and in our opinion the extension should be made.

An order will be entered granting the prayer of the petition.

Commissioners Irvine, Fennell, and Cheney concur; Commissioner Barhite not present.

278 PUBLIC SERVICE COMMISSION, SECOND DISTRICT
P.S.C. 2d D.

In the Matter of the Joint Complaint of LONG ISLAND LIGHTING COMPANY and BABYLON RAILROAD COMPANY under subdivision 5, section 66, Public Service Commissions Law, as to rate to be charged the Railroad Company for electricity. [Case No. 6608.]

A public utility power company is not compelled to furnish power at a loss to a trolley company.

A trolley company operating with so few cars and having such infrequent service that the use of electric power by it is less than 50 per cent efficient should not be allowed to transfer the loss due to its uneconomic operation to the power supplying company.

The supplying company being a public utility company and entitled to a reasonable return on the value of its property used in the public service, such loss would automatically be assessed against the other customers of the same company who would, to that extent, be carrying the operating cost of the trolley company. That cost should be borne by the customers of the trolley company for the service rendered them and not by the other customers of the power supplying utility company.

Submitted October 25, 1918; decided November 12, 1918.

Appearance:

Martin S. Decker for the Long Island Lighting Company.

FENNELL, Commissioner:

The Long Island Lighting Company is a public utility corporation selling electric current in the town of Babylon and elsewhere on Long Island. The Babylon Railroad Company is a street surface railroad which operates cars for the transportation of passengers and goods in said town of Babylon and vicinity. The trolley line is about $7\frac{1}{3}$ miles long. The Lighting Company and the Railroad Company submitted the following question for adjudication by the Public Service Commission:

What is the proper rate per kw. h. for the Lighting Company to charge the Railroad Company for power furnished to the Railroad Company from the date of such adjudication and how shall that rate thereafter be varied, either by way of increase or decrease, as the

Vol. VII.

present cost of coal to the Lighting Company f. o. b. Northport, Long Island, is increased or decreased?

The question was submitted, ". . . on the regular public records of both companies now on file with said Public Service Commission pursuant to requirements of law and upon such other further proof or evidence as shall be required or may be deemed proper by said Commission."

The filed public records of both companies were examined and a public hearing was held at Albany on Friday, October 25, 1918.

It appears that the Lighting Company generates alternating current at Northport and transmits same to its substation at Babylon where the current is stepped down by transformers, and converted into direct current by a motor generator set. The current actually delivered to the Railroad Company is direct current and is metered and paid for as such.

To determine the relation between the alternating current transmitted and passed into the generator set and the direct current used by the Railroad Company, alternating current meter readings were taken at the input of the motor generator set, and direct current meter readings were taken at the intake wire of the Trolley Company. In the month of August, 1918, alternating current meter showed 16,920 kw. h. During the same month direct current meter showed 7180 kw. h., being 42 per cent. In September alternating current meter showed 17,320 kw. h. The direct current meter showed 7000 kw. h., being 40.4 per cent. The Railroad Company operates one car part of the time, two cars most of the time and sometimes, in rush hours, three cars. One car requires 55 kw. to start, two cars require 110 kw. to start. One hundred ten kilowatts is the normal rating of the motor generator set, and this is the amount needed when the two cars happen to be starting together. When the two cars have been started and are running along, 55 kw. will keep them running.

The current is supplied from the Babylon station by a 150-kw. synchronous motor, belt connected to a 110-kw. direct current generator, and this motor generator set is run continuously from 5:45 a. m. to 12:05 midnight week days, and on Sundays from 7:30 a. m. to 12:05 midnight. The machine runs continuously for eighteen hours per day, or 540 hours for the month of September. The efficiency of the motor generator set will vary, depending on the load, and as there are times when the trolley cars are stopped, the load is constantly varying from no load to full load. The losses on this set will vary from 16 kw. to 22 kw., depending on the load on the set. According to these figures, the average loss on the set would be 19 kw. or, for the month of September, when the set was operated 540 hours, the loss would be 10,260 kw. h. During the month of September, as above mentioned, the meter reading showed an output of 7000 kw. h. which, when added to the estimated loss just mentioned, would indicate an input of 17,260 kw. h. The meter registering the input actually registered 17,320 kw. h.

We may assume 45 per cent as the all-the-year efficiency of the set. We may also assume the loss in transforming and transmitting from Northport to Babylon will be about 15 per cent. The cost of fuel at the Northport station is .88 cent per kw. h. generated. This shows 2.3 cents per kw. h. as the fuel cost of direct current in Babylon. The production cost of the Lighting Company (fuel, labor, repairs, etc.) is 1.25 cents per kw. h. generated (alternating current). Dividing by the same efficiencies, we have 1.47 cents per kw. h. as production cost of alternating current at Babylon and 3.27 cents production cost of direct current at Babylon.

The railroad load ties up investment in power station capacity, transformers, transmission lines, etc. Making the maximum reasonable allowance for intermittency of the railroad load and for diversity factors, we may assume that the railroad uses 75 kw. of the Lighting Company's generating and transmitting capacity. One hundred dollars

per kw. may be used as a rough estimate of the investment in this capacity, which means that investment to the value of \$7500 is devoted to the purpose. Allowing 15 per cent for fixed charges (return on investment, maintenance, depreciation and taxes) gives \$1125 as the annual charge, which is approximately 1 cent per kw. h. for direct current delivered. The "out of pocket" expense of 3.27 cents added to this 1 cent equals 4.27 cents per kw. h. of direct current delivered. This figure allows nothing for general and overhead expenses.

The Lighting Company can not generate current more cheaply at its Babylon plant than at its Northport plant. The Babylon plant is used to some extent but the reason for its limited use is shown by the following:

	Coal per kw. h. generated	Coal cost per ton	Coal cost per kw. h. generat'e!
Northport	4.06	4.31	.88
Babylon	10.80	6.04	3.26

The Long Island Lighting Company sells considerable amounts of current to the Huntington Light and Power Company and the North Shore Electric Light and Power Company at 3 cents per kw. h. (alternating current) in each case. It is understood that it sells alternating current in large quantity to the Government at $2\frac{1}{2}$ cents per kw. h.

The Lighting Company has offered, in view of the fact that the Railroad Company serves the public to give this particular consumer the same rate as it gives its largest consumer, the United States Government. This rate is $2\frac{1}{2}$ cents per kw. h. metered as alternating current, and will also permit the Railroad Company to have the use of the Lighting Company's motor generator transformer set and will also have its (the Lighting Company's) employee or employees in the Babylon substation look after the operation of the motor generator transformer set without cost to the Railroad Company.

The Railroad Company has telegraphed that "unless

282 PUBLIC SERVICE COMMISSION, SECOND DISTRICT

P.S.C. 2d D.

relief from power company charges is had it must suspend operation immediately".

As it costs the Lighting Company in excess of 4.27 cents a kw. h. to generate and deliver direct current to the Railroad Company, a reasonable sale price to the Railroad Company would exceed that figure.

The position taken by the Railroad Company that it must suspend operation unless the power rate is reduced below 3 cents a kw. h. d. c. makes the question of price academic, as far as this case is concerned; also makes the question of increase or decrease in rate in accordance with the fluctuating cost of coal to the Lighting Company an academic question.

It is to be regretted that not reducing the rate below 3 cents a kw. h. d. c. may force the Railroad Company to suspend operation, still it is hardly fair to compel one public utility company to carry the burden of an uneconomic use of current by another utility company which produces a loss to the supplying company. As the supplying company is a public utility company its rates to its other customers would have to carry this loss.

Because of the unusual variability of load, the Railroad Company's requirement for power brings that requirement in an exceptional class, and this case, therefore, should not be regarded as a precedent for other cases.

Commissioners Hill, Irvine and Cheney concur; Commissioner Barbite not present.

In the Matter of the Petition of ITHACA TRACTION CORPORATION under subdivision 1, section 49 of the Public Service Commissions Law for permission to increase passenger fares. [Case No. 6087.]

There is a limit beyond which street car fares should not be increased. In fact, they can not be advanced beyond a certain point without disastrous results to the company.

Decided November 14, 1918.

Appearances:

Charles E. Hotchkiss, Esq., for petitioner.

Fitch H. Stephens, Esq., and John D. Collins, Esq., for City of Ithaca.

Mrs. Grace N. Dickens for herself and other patrons.

Ross W. Kellogg, Esq., for the Ithaca Board of Commerce.

BARHITE, Commissioner:

In 1917 the Ithaca Traction Corporation made application to this Commission, by its petition filed June 25th and by its supplemental petition filed August 6th, for leave to increase its fares from five to seven cents per passenger, and for the privilege of selling four tickets for twenty-five cents. The application was referred to the late lamented Commissioner Emmet, who heard the necessary evidence, and after a most careful examination by him and the other members of the Commission, an order was made allowing the company to increase its rates from five to six cents. This increased fare rate went into effect on the 1st day of December, 1917, and has continued until the present time. It may be stated that the franchises of the company contain no restrictions as to rates. The seven cent fare asked for by the company was not allowed, because, in the words of Commissioner Emmet, the Commission "Has upon reflection concluded that the suggested increase from five to seven

cents for a single fare would neither be in the interest of the applicant company nor of the patrons of the road".

The company now files its second supplemental petition and asks that it be allowed to charge ten cents per passenger, and that it may sell twelve tickets for one dollar. The latter part of the request was changed upon the hearing for permission to sell six tickets for fifty cents. The business of the road for several years last past has been presented in the form of a number of carefully prepared schedules, the greater part of which were used at the time of the original application; and in addition is filed a statement of the business and condition of the road for the first three months of 1918, and a further schedule showing the estimated result if the prayer of the petitioner is granted. The business of the company for the first month after the six cent fare went into effect—December, 1917—is not separately shown but indirectly is mingled with the business for the whole year. The number of passengers carried during the month of December has however been furnished to the Commission since the hearing by the attorney for the company. It may be remembered as a matter of general deduction that the schedules for the first three months of 1918 do not probably indicate the real effect of the six cent fare upon the business of the company, because of an unfortunate explosion in the power house of the company on December 28, 1917, as the result of which the business of the company was seriously affected for some time. The order of the Commission which took effect on the 1st day of December, 1917, must stand as a fair and proper adjudication of that date. The matter was fully and carefully considered, and our attention has not been called to any error in the conclusions or deductions made at the time. It will, therefore, only become necessary to consider the condition of the company subsequent to that date.

If we examine the submitted figures, we find that as the result of the first three months' operation in 1918 there was available for return upon the property in the increased fare

Vol. VII.

zone \$3171.02, or at the same ratio for the whole year, \$12,684.08, as against \$6302.91 for the year 1917.

By figures submitted it appears that the company carried 118,430 six cent fare passengers in January, 1918, which was 54,610 less than the number carried in December, 1917. This loss of business was undoubtedly due to the explosion in the power house on December 28th which prevented the company from performing its functions for a time afterward. In February, 1918, 156,781 passengers were carried, and in March, 176,852, a total for the three months of 452,063, indicating an income from that source of \$27,123.78. If a seven cent fare had been in operation, and we find under the testimony of the railroad that because of the increase there would probably have been a falling off of 7 per cent in the number of passengers carried, then the income would have been \$29,709.26, an increase of \$2064.85 in income, or \$8259.40 per year: sufficient to take care of the recent increase of wages for motormen and conductors amounting to approximately \$8000 per year. There is a limit beyond which trolley fares should not go; in fact, they can not be advanced beyond a certain point without disastrous results to the company. In these times of heavy burdens the people should not be required to pay an excessive fare. If they are required to pay such fare, the result will be detrimental to the corporation itself. It is practically conceded that dividends have been paid in the past when the money so used "in ordinary prudence" should have been used for the rehabilitation of the property. If the stockholders in the past have received money which ordinary business sagacity should have applied to maintaining properly the road, no complaint can be made if patrons are not required in these strenuous times to furnish money, not alone to make repairs which could have been made in the past, but also to pay dividends. In fact, the adoption of such a course would be equivalent to a declaration that dividends must be the first concern in the management of a public service corporation. The claim is made by the

286 PUBLIC SERVICE COMMISSION, SECOND DISTRICT

P.S.C. 2d D.

city that the officers of the company are enjoying salaries larger than the condition of the company warrants, but this claim is not substantiated by the evidence. The company should be allowed to charge seven cents instead of six, and to sell eight tickets for fifty cents.

Commissioners Irvine, Fennell, and Cheney concur; Chairman Hill not present.

Petition of HUDSON VALLEY RAILWAY COMPANY under subdivision 1, section 49, Public Service Commissions Law, for permission to increase passenger fares. [Case No. 6085.]

The Public Service Commission has jurisdiction to regulate rates of fare in municipalities where franchise rate restrictions exist, provided the proper local authorities waive those restrictions.

During the emergency created by the high price of labor and materials resulting from the present war, the Commission is justified in giving relief by increased rates to public service corporations to enable them to pay operating costs and fixed charges without the careful valuation which an ordinary rate case involves, provided it reasonably appears that the valuation of the property used in the service at least equals the amount of the interest bearing debt.

As a general proposition, the tariff schedule for an interurban electric road should be constructed on the mileage basis rather than on the zone basis, the latter being only appropriate for urban business.

While the matter of readjustment of rate bases for electric roads is in the experimental stage, violent changes should be avoided, and consideration should be given to the circumstances of each case, and the system developed by experience in the particular locality.

The voluntary establishment of a certain method of charging fare, and its continuance for years, resulting in the location of patrons in particular places in reliance thereon, creates an equity which should not be lightly regarded, even though an apparent discrimination is involved.

Decided November 19, 1918.

Appearances:

James McPhillips, Glens Falls, N. Y., *H. T. Newcomb*, 32 Nassau street, New York city, and *John E. MacLean*, Albany, N. Y., for the petitioner.

Harold W. Turner for the Town of Waterford.

CHENEY, Commissioner:

The Hudson Valley Railway operates an interurban trolley road beginning at the corner of Broad and Third

streets, in Waterford, and extending northerly along the Hudson river through Mechanicville, Schuylerville, Fort Edward, and Hudson Falls to Glens Falls; and from Glens Falls through Lake George to Warrensburgh, in Warren county; a branch of the road extends from Mechanicville to Ballston Spa, and through Saratoga Springs to Glens Falls; and another branch from Thomson over to Greenwich. There is also local service in Saratoga Springs and in Glens Falls, including a portion of the road between Glens Falls, Hudson Falls, and Fort Edward. While the lines of the Hudson Valley Company end at Broad and Third streets in Waterford, the cars are actually operated to the Union Depot in the city of Troy on the tracks of the United Traction Company, under a traffic contract by which the United Traction Company furnishes the tracks and power and the Hudson Valley Company the cars and employees, the fare collected being the United Traction Company fare and is divided equally between the two roads. In the practical operation of the road it is divided into fare zones of different lengths between designated stops, and a fare of 5 cents is at present collected for each fare zone.

The company has presented to the Commission its complaint under section 49 of the Public Service Commissions Law, and has asked the approval of the Commission to an increase in the fare collected in each zone, within incorporated cities and villages, from 5 cents to 6 cents.

There are provisions in various franchises under which the road is operated in Saratoga Springs, Glens Falls, and Ballston Spa, limiting the rate of fare to be charged to 5 cents. There have been filed with the Commission waivers of such restrictions from the municipal authorities of those municipalities, submitting to this Commission the matter of fixing the rates in such municipalities with a maximum of 6 cents. Those franchises are therefore no bar to the consideration by this Commission of the present application. "The Public Service Commission may, with the consent of the local authorities evidenced as provided by law, increase

Vol. VII.

rates of fare previously agreed upon by street railroad corporations and the city." (*Matter of the International Railway Company v. Rann*, 224 N. Y. 83.)

Pending the determination of this proceeding, the company filed a tariff, effective August 29, 1918, by which the rates of fare in all zones outside of cities and villages were increased from 5 to 6 cents. The Commission being of the opinion that it should on its own initiative enter upon a hearing concerning the propriety of the proposed increased fare, suspended the tariff schedule, and called a hearing thereon; and that proceeding has been consolidated with this one pending upon the company's application. There is, therefore, before the Commission for determination the justness of the proposed increases in fare upon the whole road. Notice of this proceeding was given to all persons and municipalities interested; and while some of them appeared, no serious opposition was made to the increase proposed, and no evidence was produced controverting in any degree that offered by the company.

The statement of income and disbursements taken from the books of the company for the years 1901 to 1917, shows that in each of such years the income was not sufficient to pay operating expenses and interest and other income deductions. For the year 1917 this deficit amounted to \$104,878.46, while for the whole period there is a deficit amounting to \$1,201,804.78. It also appears that the operation of the road for the first six months of 1918 shows a deficit of \$94,703.54, and that from its operation there was realized only \$26,171.38 above operating expenses and taxes. Included in the receipts for that six months was an item of \$23,669.41 received from the sale of power from the Mechanicville plant, thus showing that the income from direct railway operation was just about equal to the operating expenses. Increases in the wages of employees have been granted from time to time during the year 1918 which had been practically compelled by the action of the War Labor Board in granting increases to the employees of other

traction companies in the same field. The increase in operating expenses for that one item alone, upon the basis of wages effective July 1, 1918, will amount to the sum of \$112,442.64 per year. It also appears that there have been increases in the cost of the different materials used by the company in the maintenance and operation of its road varying from 2.4 per cent to 63.66 per cent. From these figures it is apparent that at the present amount of travel and present rates of fare this road will for the period beginning July 1, 1918, be in receipt of revenue hardly sufficient to pay its operating expenses alone, without taking into consideration at all the matter of fixed charges upon its indebtedness or return upon capital invested in the property used in the service. The total length of this road is 110.986 miles, and it serves large communities, including many populous and flourishing cities and villages. It carried in 1917 6,498,249 passengers, and has carried more than that in previous years. It must be evident that this road is a necessary part of the transportation facilities of the communities which it serves, and it should not be permitted to cease operations and go out of business. It is equally evident that it can not continue to be operated unless the receipts from such operation are at least sufficient to pay the expenses thereof and the fixed charges to which it is subjected, nor can it be expected to be operated indefinitely unless some return is made for the capital invested in the enterprise. No dividends have ever been paid upon the stock representing any investment in this road above the bonded indebtedness, and certainly since 1901 it has not earned sufficient to pay its fixed charges but has faced a constantly growing deficit. It can not be expected that this condition of affairs can go on indefinitely, and unless some relief is had the inevitable result will be bankruptcy, with a possible discontinuance of operation. The only other alternative is such an increase in rates that the income will be sufficient to justify the continued operation of the line.

Although it is apparent that the company is entitled to

and must have an increased revenue, it is not asking in this proceeding that an order be made fixing rates at such a sum as will yield an adequate return upon the capital invested, as is its right. It is only asking that it may be permitted to put into effect certain specified rates, and the Commission has treated the proceeding as involving only the question as to whether or not such proposed rates are reasonable, and has not gone into any of the questions which ordinarily arise in a rate case where the effort is to arrive at a rate schedule which will realize sufficient revenue to pay operating expenses and leave a surplus which will be an adequate return upon the value of the property used in the service. In other words, this case has been treated as an emergency case, the result to be attained being the fixing of a rate which would pay the operating expenses and interest charges to which the company is subjected, so that the road may be continued in operation. The matter of return on capital must wait until after the war is over and more normal conditions prevail.

The increase proposed is from 5 to 6 cents in each of the fare zones. Upon the basis of the 1917 travel, the maximum possible increase in revenue would be \$115,615.93. Allowance must be made for a falling off in travel to a certain extent due to increase in rates, as experience shows that always follows. Assuming that three-quarters of the maximum is actually realized, and that is a large percentage as these cases go, the actual increase in available funds would be \$88,712.95. As already shown, even if the maximum amount of the increase is realized it will practically all be paid out in increased wages already in effect. The increased price of materials will in all probability absorb any balance there may be. It might be claimed that there will be an increase in travel due to the normal increase in population. We do not look for any increase in revenue thereby, as the decrease occasioned by the absence in military service of a large number of young men from the territory tributary to this system will probably offset any such increase. There

may be some increase in freight receipts, but the volume of this kind of business is so small that this item may be ignored as not affecting probable results.

As interest on indebtedness must come out of the amount which theoretically is available for return on invested capital, there remains to be determined whether the amount available for interest is justified by the value of the property used in the service. Or, to state it differently, whether that value is equal to the amount of interest bearing debt. The funded debt of this company upon which interest is paid is \$2,704,000, and the annual interest is \$140,020. There is also bonded indebtedness amounting to \$2,974,000, the interest upon which is payable only when earned, and no interest has ever been paid upon this indebtedness. The floating debt amounts to \$2,396,822.84, on which the annual interest is \$107,096.64, making the total interest charge against the company now payable \$247,116.64. The rate of interest on this indebtedness is all under 6 per cent except on \$382,000 in underlying bonds and less than \$80,000 in notes, and over \$1,500,000 is only at 4 per cent, the average being 4.84 per cent, so that the rate of return can not be questioned. Excluding the debenture bonds upon which interest is not being paid, the bonded indebtedness is only at the rate of \$25,000 per mile of road. Treating the other interest bearing indebtedness as if it had been funded, the total is raised to but \$46,850 per mile, which is below the average of funded debt per mile of all the electric railroads in the Second Public Service Commission District for 1917, which is \$47,200. The road is 110.986 miles long, with all the equipment necessary for its operation, including a superior snow fighting equipment. It is in first-class operating condition. It was recently examined by the inspectors of this Commission and but few suggestions were made as to improvements or changes after that inspection. All of those suggestions have since been carried out by the company. During the last eleven years there has been expended in additions and betterments in actual cash \$1,156,247.83, and for main-

tenance of way and equipment \$1,616,275.86, a large amount of which value is no doubt still reflected in the property. While no formal or detailed valuation has been made or attempted in this proceeding, there is much evidence in the record from which its value can be inferred, which makes it not unreasonable to assume a value for rate purposes of \$5,000,000, which is practically the amount of the interest bearing indebtedness. Certainly no one could complain of this valuation except the company itself.

The gross income for the year 1917 was \$161,918.88. Deducting from this rents and other income deductions except interest, \$19,815, we find \$142,103.88 applicable to return on capital, including interest on indebtedness. This is but 2.84 per cent upon a valuation of \$5,000,000. If we should assume the maximum increase of revenue from the proposed increase of rates \$115,615.93 and ignore entirely the known increase in operating expenses, we would have a rate of return of but 5.15 per cent. These violent assumptions show that even upon the most favorable showing possible, the proposed increase is not unjust toward the public.

The evidence in this case does not satisfactorily answer the question whether the mandate of section 181 of the Railroad Law should be disregarded in fixing the rates of fare in cities and incorporated villages. We are confronted with the same difficulty which we meet in every case where the operations of the road are not confined to one municipality, that it is impossible to determine from the accounts kept by the company precisely the revenues received or the expense of operation in each particular municipality. That is particularly true in the case of the cities and villages through which this road merely passes. In these municipalities there is practically no local riding, so that there is no separable income. As the cars are through cars there is no separable expense of operation, although a few items like expense of maintenance of pavements might be allocated. In the case of the cities of Saratoga Springs and Glens Falls,

where there is a local operation, it is possible to give, and we have been furnished with the figures of the revenues and expenses of these purely local operations. But these figures do not accurately reflect the whole municipal operation, for no consideration is had of the part of the interurban traffic which actually occurs within the municipality.

Probably the only feasible method of determining whether the municipal operation can be carried on for the statutory fare is upon the car-mile basis. As there can be no question but that urban operation is more expensive than interurban, if the operation of the whole road per car-mile is at a figure disproportionate with the revenue, it is fair to assume that the same result applies to the urban traffic. It appears that the average earnings per car-mile for the whole system for the year 1917 was 33.47 cents, and the average expense of operation, including taxes and other income deductions except interest and return on capital, was 26.93 cents per car-mile. For the first seven months of actual operation for the year 1918, the revenue was 36.57 cents per car-mile, and the operating expense 33.59 cents. The estimated figures for the remaining five months of 1918, with the increased operating expense occasioned by the higher wages, are revenue 36.72 cents per car-mile, operating cost 34.64 cents. The revenue from the local service in Glens Falls in 1917 was \$136,739.87, an average of 26.82 cents per car-mile; and for Saratoga Springs, \$11,599.22, or 22.96 cents per car-mile; both of which were less than the average per car-mile cost of operation for the whole system. The estimate for the year 1918, based on actual figures for seven months' operation, and an estimate for the remaining five months on the basis of the corresponding period of the preceding year, shows a greater disparity. The estimated revenue for the Glens Falls system is \$146,312.50, an average of 29.40 cents per car-mile, and for the Saratoga Springs system \$11,887.68, an average of 25.17 cents per car-mile, which must be compared with an average operating cost of the whole system of 34.64 cents per car-mile.

When we consider that the average revenue for the balance of the system, excluding the local service at Glens Falls and Saratoga Springs for the year 1917, was 36.60 cents per car-mile, and that the estimated revenue for 1918 on the basis used previously will amount to 39.50 cents per car-mile, it is evident that the balance of the system is carrying the local service in both places; and to afford just relief to this company, the statute should not prevent the raising of fares in those localities to as great an extent as they are raised on the balance of the system. Even if that should be done, they will not carry their fair proportion of the burden.

One of the most perplexing questions in this case concerns the form of the rate structure to be adopted. This road is almost entirely an interurban one and the majority of the passengers are carried for long distances. The business more nearly approaches that of the steam roads, and it would seem that its rates should be based upon the mileage traveled, a system that is in successful operation upon steam roads. In the tariff proposed, the road is divided into zones of different length and a uniform fare is proposed to be charged in each zone. The result is that travelers from point to point in each zone pay the same fare irrespective of distance traveled, and through passengers pay a different rate per mile, depending upon the different mileage in the different zones.

It must be admitted that the zone system is the one in most general use upon electric railroads both urban and interurban, and is a result of the development of the electric roads in the country. These roads originally were exclusively city roads, for the most part being the electrification of the old horse-car lines existing in the large centers of population. These roads were operated with a unit fare applicable, irrespective of the length of haul, the short haul offsetting the long haul and resulting in an equitable average compensation for the service rendered. As the business and the population increased, these roads were lengthened and even extended to outlying suburban districts, and eventually through sparsely settled rural territory to nearby cities and villages. Com-

bination of different independent roads were made and the result is the vast network of electric roads which is doing practically all of the local passenger transportation of the country today.

As the distance increased, it was soon evident that the unit fare was not adequate compensation beyond a certain point, and the system grew by adding new zones with the same unit fare as the roads were gradually extended. Practical experience demonstrated that it was not feasible to make these zones of equal length, as the many circumstances arising from local conditions in each case determine the limits of the zone area: the topography and the population of the country, the markets and industries along the line, all the varying conditions which regulate the flow of travel have had their effect, the underlying principle being that all people similarly situated should have the same treatment.

While strong arguments can be made to justify this system of fares in cities and closely built up centers where there is considerable riding between different points in the same zone, yet it must be admitted that it is theoretically inequitable because it charges a greater proportionate rate for the short ride to make up for the inadequacy of the compensation for the long ride. This disproportion is accentuated in the longer distance, especially in the case of the one living but a short distance beyond the zone limit. He must pay the full rate for the zone although he may ride but a few rods in the second zone, and the limits of his journey in the two zones may be such that he pays twice the fare for a ride of the same distance as would one traveling entirely within the limits of one zone.

While it may fairly be said that the matter of the readjustment of rates upon electric roads is still in the experimental stage, many different methods being tried out in different parts of the country, if this were an ordinary rate case where full consideration were given to all questions that might arise, it is doubtful if the Commission would approve a tariff for the purely interurban portion of this company's

system constructed upon the zone system. But it appears that this company has arranged its rates upon this basis for years without objection, and the limits of the zones have been worked out from experience in a manner apparently satisfactory to the great bulk of its patrons, as is evidenced by the fact that no objection is made here to the system as a whole, and the only objection received is as to the limits of one particular zone, the effect of which if adopted would be to make the inequality still more marked.

It is undoubtedly true that many of the patrons of the road have established their residences and acquired property having in view the present zone system. There is authority for the contention that the voluntary establishment of a certain method of charging fares, and its continuance for years, resulting in location of patrons in particular places in reliance thereon, creates an equity which should not be lightly regarded, even although an apparent discrimination is involved. (*Concord, M. & H. St. R. Co. Case*, P.U.R. 1917 E. 70.) In view of all the circumstances we are not disposed, in this emergency proceeding, to open up the question, but will reserve it for future consideration. This case, however, is not to be considered as a precedent binding upon the Commission as to other roads, nor even as to this road in any future proceeding.

We are therefore of the opinion that the present rates of fare charged by this company are unjust and inadequate in that they do not provide sufficient income to pay the operating expenses and fixed charges or to render an adequate return upon the capital invested in the business, and that it is our duty to grant an increase of fare. We are also of the opinion that the increase asked for by the company in this proceeding will not probably produce such a sum that after payment of operating expenses and providing adequately for depreciation and contingencies, there will remain a sum applicable to return on capital which will more than pay the fixed charges, if indeed it will be sufficient for that

298 PUBLIC SERVICE COMMISSION, SECOND DISTRICT

P.S.C. 2d D.

purpose, and in any event will not permit an undue return upon the invested capital.

An order should be made granting the increase asked for, and providing that the fares to be charged by this company in the future shall be six cents in each of the zones where five cents is now charged, and permitting the filing of a new tariff schedule fixing the new fare upon short notice. It is understood, however, that the fares to be so fixed shall continue only during the war and a reasonable time thereafter, when a further application may be made to the Commission for a readjustment of fares.

All concur.

Petition of FLORI BUSCHINI under chapter 667, laws of 1915, for a certificate of public convenience and necessity for the operation of a stage route by auto buses in the city of White Plains, it being proposed that the route shall also be operated to the incorporated village of Pleasantville, Westchester county. [Case No. 6613.]

An established stage route lying partly inside and partly outside an incorporated city, which is giving satisfactory service and caring adequately for the traffic offered, will be protected from the competition of a proposed parallel line so far as concerns that part of the route lying inside the city.

Decided November 19, 1918.

Appearances:

Strang & Taylor, White Plains, N. Y. (Mr. Strang appearing), for petitioner.

Martin J. Birmingham, White Plains, N. Y., as attorney for Lewis R. Fisher, in opposition.

HILL, Chairman.

The respondent, Lewis R. Fisher, pursuant to chapter 667 of the laws of 1915, obtained a certificate of public convenience and necessity from this Commission on March 20, 1917, for the operation of a stage route by auto buses, and has ever since been operating such route under such certificate on a portion of Main street, Broadway, and North Broadway, in the city of White Plains, the distance being about one and one-half miles to the northerly city line. From that point Fisher continues his route about three and one-half miles to the hamlet of Valhalla. No complaint has been made about Fisher's service or rates, and it seems to have been in all respects satisfactory to the public as well as to himself.

The petitioner having secured the consent of the local authorities, now asks for a certificate of convenience and

necessity for a similar line of vehicles over the identical route within the city of White Plains traversed by Fisher, and proposes to continue his service from the city line northerly through Valhalla and then a distance of about seven miles farther to the village of Pleasantville. In fact, the petitioner did operate this route without the requisite certificate until he was obliged to discontinue by reason of an injunction obtained from the Supreme Court by Fisher, on the ground that operation within the city without such certificate was unlawful.

The effect of the statute referred to was to limit the jurisdiction of the Commission with regard to stage routes to those portions thereof which are to be operated within the limits of incorporated cities, and the Commission has heretofore held that it would be a usurpation of authority for it to use its power of granting or withholding a certificate to operate along city streets for the purpose of thus indirectly regulating competition over or along rural highways. (*Bartholomew et al., Stage Routes*, 5 P. S. C. 2nd Dist. N. Y. 96; *Petition of Gaiser, Stage Routes*, Case No. 6437, decided June 6, 1918.) The portion of each route lying within the limits of the incorporated city of White Plains is, however, subject to the jurisdiction of the Commission, and although it appears that the petitioner does not intend to carry passengers who embark and disembark within the city of White Plains, nevertheless the portion of the through route within the city of White Plains does come squarely in competition with that part of Fisher's line in the city; and inasmuch as this portion of each route is an important section of each entire route, the question properly arises whether the certificate prayed for should be granted. It is evident that Fisher has by patience and diligence built up a legitimate business which seems to be reasonably profitable, and it does not appear that there is any more business on the city section of the route than he is amply taking care of. That being so, it seems clear that so far as concerns passengers to and from Valhalla a large

Vol. VII.

part of his city business will be taken from him by the competitor. The danger is that the business being divided between two carriers will be profitable to neither, and that in the long run the equipment of both will wear out in unprofitable service and neither will be able to continue. The result would be that the public would not be able to get any permanent service whatever.

The argument is advanced by the petitioner that inasmuch as the proposed line is the longer of the two and therefore inclusive of the service now given by Fisher he should have preference. But if the Commission were permitted to consider the proposed routes outside of the city, it would seem to be a fair answer that Fisher is there first and will naturally respond to demand for any profitable business which can be taken north of Valhalla. In fact, he states it is his intention next Spring to continue his line to Pleasantville.

On this state of facts, in view of the invariably disastrous results of cutthroat competition in public service, it would seem that the public interests can best be served by preserving to Fisher the public service which he is now performing within the city of White Plains, it appearing that such service is adequate and satisfactory.

An order will accordingly be entered denying the petition.
All concur.

302 PUBLIC SERVICE COMMISSION, SECOND DISTRICT
P.S.C. 2d D.

Petition of NEW YORK STATE RAILWAYS under subdivision 1, section 49, Public Service Commissions Law, for permission to increase passenger fares. [Case No. 6090.]

Invested capital, for the purpose of computing rate of return to a public service corporation, means the actual value of the property used in giving the service.

This has no connection with the share capital of the corporation, and it is not material whether the capital was raised by the issuance of bonds or the sale of stock.

Interest on bonds and other borrowed money must come out of the amount applicable to return on invested capital.

If the operation of a railroad in one municipality affords a fair return upon the value of the property used in the service in that municipality, no increase in fare would be justified there, even though by reason of the fact that operations of the same company in other communities are conducted at a loss, the company is not receiving a fair return upon its entire invested capital.

Decided November 26, 1918.

Appearances:

Warnick J. Kernan for the applicant.

D. N. Beach for the applicant.

Stewart F. Hancock, Corporation Counsel, for the City of Syracuse.

George B. Dolson, 300 Merchant Bank Building, Syracuse, attorney for the Village of Liverpool.

Lamont Stillwell, 331 Union Building, Syracuse, attorney for the Village of Solvay.

Irving Higby, 704 City Bank Building, Syracuse, attorney for the Village of Eastwood.

B. B. Cunningham, by Clarence M. Platt, 46 City Hall, Rochester, for the City of Rochester.

Ezra Hanagan, Assistant Corporation Counsel of the City of Utica, for the City of Utica.

A. J. O'Connor, Rome, for the City of Rome.

William S. Rhodes, Little Falls, for the City of Little Falls.

D. C. Burke, Oneida, for the City of Oneida.

James D. Smith, Mayor City of Utica.

August Merrill, Corporation Counsel City of Utica.

CHENEY, Commissioner:

The New York State Railways filed a petition or complaint under section 49, subdivision 1, of the Public Service Commissions Law with this Commission, asking that permission be given to it to increase its rate of fare from five to six cents in the cities of Rochester, Syracuse, Utica, Rome, Oneida, and Little Falls. The City of Rochester appeared and objected to the jurisdiction of the Commission on the ground that the fare within that city had been fixed by a special statute, and also that certain contracts and municipal consents or franchises between the city and the railroad company and its predecessors fixed the rate of fare at five cents. The City of Rochester also sued out in the Supreme Court a writ of prohibition directed to the Commission to restrain it from continuing the proceeding, and the case was taken through to the Court of Appeals, where the contention of the city in some aspects was sustained, and the writ directed to issue. (*Matter of Quinby*, 223 N. Y. 244.) By that writ the Commission is forbidden to consider the question of the rates of fare in the city of Rochester; and in obedience to that writ we have eliminated that inquiry from this proceeding, and have considered the case only as it applies to the rates of fare in other places as to which the writ does not apply.

The cities of Syracuse and Utica also objected to the jurisdiction of the Commission on the ground of alleged fare restrictions contained in various municipal franchises and consents, but those objections were afterward withdrawn. In the case of Utica, a formal resolution of the common council of the city was presented, waiving during the continuance of

the war the provisions of all franchises limiting the rate of fare, and submitting the matter to the examination and determination of this Commission, any increase of fare, if granted, to be not more than six cents where five cents was formerly charged. In the case of the City of Syracuse, the corporation counsel appeared before the Commission at the hearing and formally withdrew the objections theretofore filed to the jurisdiction of the Commission, and stated that the position of the city was that the question of the effect of the franchises granted by the City of Syracuse to the petitioner was not before the Commission, and should therefore not be passed upon; and no proof was given of any such franchises in the proceeding. Under those circumstances the Commission can fix the rate of fare so far as Utica and Syracuse are concerned. (*Matter of International Ry. Co. v. Rann*, 224 N. Y. 83.)

No evidence was given as to the justness of the rate in either Rome, Oneida, or Little Falls, and no determination is therefore made by the Commission with reference to fares in either of those cities, and the Commission will retain jurisdiction of the proceeding for the purpose of further investigation and determination of such questions as may arise in those cities should such action be desired.

An agreement between the railroad and the cities of Syracuse and Utica provided that those cities might employ accountants to examine the books of the company, and the case was submitted to the Commission upon the report of the examination made pursuant to such agreement, verified by the accountants who made it. It also appeared that an inventory and appraisal of the property of the company had been made by independent engineers, employed by the company, for the purpose of allocating its fixed capital account according to the classification prescribed by the Commission in its Uniform System of Accounts for Street Railroads, which inventory and appraisal was under examination in the departments of the Commission. The engineers who made

Vol. VII.

this inventory and appraisal were produced at the hearing and verified the same, and it was introduced as a part of the record of the proceeding.

It also appeared during the pendency of the proceeding that the City of Rochester had procured an examination to be made of the books of the company by a separate firm of accountants and that a report had been made of such examination. At the request of the Commission and with the consent of the representatives of the company and of the cities involved, the Commission was furnished with a copy of this report, as well as the report of the other accountants pertaining particularly to the city of Rochester, and the same have been received as a part of the record in this proceeding and considered as throwing some light upon the general condition of the company. The Commission has had all these reports, as well as all reports of the company on file in its office, examined, compared, and analyzed by its division of statistics and accounts, and the report of such division is also, by agreement of the parties, made a part of the record in the case.

While the method of the presentation of this case has been unusual, on account of the emergency existing because of the immediate necessity of large increases of wages ordered by the War Labor Board, the Commission believes that it has been put in possession of all the facts relating to the operation of the company necessary for the determination of the application, and that the rights of the communities affected have been carefully looked after by the authorities of those communities.

The New York State Railways was formed as a consolidation of a number of street railways, and at present operates the local system of street railways in Rochester, Syracuse, Utica, Oneida, and Rome. It also operates the interurban line from Syracuse to Utica on the electrified West Shore Railroad, known as the Oneida line, and a number of other interurban lines. For the purpose of accounting, pursuant

to an order of the Commission, the road is divided into four divisions, called the Rochester division, the Syracuse division, the Utica division, and the Oneida division. The Rochester division includes the local lines in the city of Rochester and those radiating from it, including the road to Charlotte and two interurban lines to Sodus and Geneva, which latter includes the local operation in Canandaigua. The Syracuse division includes the local system in that city and certain extensions into suburban territory known as the Solvay, Liverpool, Rockwell Springs, and East Syracuse and Minoa lines, but no interurban roads. The Utica division comprises the Utica city system with its suburban extensions, the principal one being the line through New Hartford to Clinton, and also an interurban road from Rome, through Utica and Herkimer to Little Falls, which includes the local system operated in Rome. The Oneida division includes the interurban line from Syracuse to Utica as well as the local system in and about Oneida.

The company, for the most part, owns its own tracks and equipment, although small portions of the lines are operated under leases.

There is no doubt but that the operation of the various lines of this company is absolutely necessary for the successful prosecution of the business and social activities of the various communities which it serves. Transportation is one of the necessities of modern life, and upon it depends the whole social fabric. The residents of these communities have no other means of getting from place to place and would be wholly unable to carry on their affairs if this was taken from them. In this territory are located many large manufacturing plants, many of which are engaged in the prosecution of essential war work, and the deprivation of transportation facilities is absolutely unthinkable; and it is the duty of the Commission to furnish any relief in its power when it appears that there is danger of such a result.

It is axiomatic that these facilities can not be provided

unless the income produced by their operation is sufficient to pay the cost thereof. The cost includes not only the operating expenses, but also the interest which must be paid upon the money which was borrowed to produce the plant with which the service is rendered; and in that statement we do not take into consideration the right to an adequate rate of return on invested capital, which has been so often stated by the courts. Our consideration of this case has led us to the conclusion that we are not concerned here with the fixing of a rate which will give any real return on invested capital, but merely to fix such rates as will permit this company to tide itself along and meet the extra demands made upon it through the abnormal increase in the cost of both labor and material, which rates should be continued in effect until, with the coming of peace, which now appears to be probable in the near future, and the return to normal operating conditions, the matter can be again investigated and rates fixed which will be just, not only to the public, but also to the company.

We first direct our attention to the need of additional revenue. In that inquiry it will be necessary to examine the accounts of the operation of all the lines; for if the system as a whole is producing an adequate return, our function would rather be an adjustment of rates as affecting the different communities without increasing the gross return.

The report for the year 1917, which is the last full year's operation to which we have access, shows a gross income after deducting operating expenses and taxes of \$2,263,576. Payment from that of interest and other income deductions, according to the uniform system of accounting, left a net corporate income of \$824,988. As it appears that the estimated increase in wages to be paid for labor on the basis of the award of the War Labor Board, when adjusted to a normal year's operation, will amount to approximately \$1,025,-718, and that a very large increase in the cost of the necessary materials for operation will necessarily have to be met,

as very little of the effect of such increases appears in the 1917 report for the reason that the company had on hand a supply of low priced materials which it used in that year's work, it would seem that there can be no question that there must be an increase in revenue if the company may be able to pay operating expenses and fixed charges.

No suggestion has been made that any saving can be made in operating expenses. Certainly none can be made without a decrease in service, which is a method which should not be adopted. Indeed, all the communities served are crying for more and better service, and if any change is to be made in operating conditions, it should rather be toward an increased rather than a decreased service. There is no evidence that the operating cost is unduly high, for upon an examination of the reports on file in this office it appears that the expense per revenue car-mile of this company compares very favorably with that of the other electric railways serving the larger urban centers in the Second Public Service Commission District.

The company has not in the past set aside an adequate reserve for depreciation, or renewal of property which will be worn out in the service. It is now universally conceded that this is a legitimate operating expense which should be paid for out of earnings: an adequate sum should be set aside each year to provide a reserve fund out of which property purchased to take the place of that which is worn out or becomes obsolete in the service can be paid for. In constructing the probable operating expense account for the future, provision should be made for an adequate depreciation reserve, on the basis of 2 per cent of the flat field costs of track and roadway, electrical construction, and other fixed improvements, and 3 per cent of the flat field costs of rolling stock, power house equipment, shop machinery and tools, and other equipment, which the Commission believes to be reasonable and not more than has been advised by it in other cases. This will add \$374,783 to the operating expenses.

Vol. VII.

after deducting the sum of \$100,000 which appears in the filed reports. This item is a charge for amortization set up on the books by order of this Commission in a previous case, and represents depreciation which should have been but was not provided in the period prior to December 31, 1914, and should come out of the sum available for return on investment rather than out of earnings as an operating charge.

Aside from the necessity of paying fixed charges, as a practical proposition, to prevent bankruptcy and foreclosure, there can be no question in this case but that the company is entitled to earn at least the interest upon its indebtedness as a return on invested capital. The interest bearing obligations of the company outstanding on April 30, 1918, were as follows:

Bonded debt.....	\$24,690,500
Real estate mortgages.....	36,000
Loans and notes payable.....	1,535,000
Paving assessments:	
Rochester.....	136,199
Syracuse.....	280,176
Eastwood.....	2,800
Total.....	\$26,630,675

The average interest paid on these obligations, including the charges for amortization of debt discount and expenses, amounted to 4.96 per cent.

Although this Commission has stated many times the true rule which must be adopted in determining what is meant by "return on invested capital" as applied to a rate case, we will risk a repetition of it, for the reason that the arguments made in almost every case which comes before the Commission show that the rule is not generally understood. "Invested capital," for the purpose of computing rate of return to a public service corporation, means the actual value of the property used in giving the service. This has no connection whatever with the share capital of the corporation, nor is it material whether the capital was raised by the issuance of bonds or the sale of stock. Neither does it make the slightest difference whether the issued capital stock is "watered" or not, nor to what extent the "water" may be

present. The injection of "water" can not add one cent to the value of the property which is actually used, and that is the only inquiry which the Commission is interested in.

This rule is laid down in the leading case of *Smyth v. Ames*, 169 U. S. 546, in the following language: "The corporation may not be required to use its property for the benefit of the public without receiving just compensation for the services rendered by it. . . We hold, however, that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction, must be *the fair value of the property being used by it for the convenience of the public*. . . What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience."

To determine the return realized, it is necessary to deduct from the revenues the actual legitimate operating expenses and taxes, and the remainder is the sum applicable to return on invested capital. If this sum exceeds the rate which has been determined upon as a proper rate of return in that case, the rates charged the public for the service should be reduced. If this sum falls short, the rates charged the public should be increased. If a part of the invested capital has been borrowed, the interest must be paid out of the sum applicable to return, and the balance only, if any there be, can be paid to the stockholders as dividends. It is only in the distribution of this balance that the question of watered stock becomes material, for the dividend will be diluted to just the extent that the stock has been watered. In a rate case we are not concerned with the amount of the issued share capital, but in a capitalization case we are, for there the effort is to be sure that actual value is behind every share of issued capital.

There can not be any just claim made that the value of the property used in the service by this company does not equal the amount of this interest bearing debt. In fact, it exceeds it by a large margin. While no careful and

detailed valuation of the property so used has been made, the Commission has gone into the question to the extent sufficient to determine that fact, for the purposes of this case only, but not for the purpose of making a valuation to be considered as a precedent in any future rate case.

It appears that an inventory and appraisal of this property was made by independent engineers, who, however, were employed by the company for that purpose, under date of June 30, 1917, which has been extended to January 1, 1918. That consisted of an actual inventory of the existing property on the ground, and the valuation was fixed according to the trend of prices, for the most part for the ten years immediately preceding June 30, 1917, as ascertained from an inspection of the vouchers of the company representing actual purchases made by it. While this method of fixing value may probably give a result somewhat higher than if confined entirely to pre war prices, the unit prices used were very much less than the prices current at the time the appraisal was made. Upon the basis of this inventory, the total field costs of the tangible physical property of the company, exclusive of all items described as overhead, consisting of omissions, preliminary expenses, legal expenses, administration, engineering, taxes and interest during construction (all of which are recognized as legitimate elements to be considered on a valuation) amounted to \$33,537,849.22. As this figure is so much in excess of the \$26,000,000 interest bearing debt, we need not consider the items of intangible value added to the appraisal, as stated above, which amount to \$10,427,671.07, or the items claimed for working capital, cost of financing, and going concern value, which add a further sum of \$8,987,981.60 to the valuation: making the total valuation, according to this appraisal, of \$52,953,502. While the Commission is not bound by the figures of this appraisal and might not be willing to adopt the method of fixing unit prices used there, still there is such a large margin between the figures for the tangible physical

property and the amount of the interest bearing debt that we are amply justified in using the latter sum as the rate base for the purpose of this proceeding.

For the purpose of comparison, we may perhaps be justified in giving attention to the investment account as appearing on the books of the company. While we are aware that there is not necessarily any relation between the book investment and the actual value of the property, especially in the case of those companies which were in business before railroads became subject to the jurisdiction of the Commission, and we would not consider adopting in a rate case, the book figures, without a careful check to determine that they accurately represent at least the actual cost of the property and do not contain any items for intangibles other than those which legitimately enter into the fair value of the property as it stands, still those figures may be of value as throwing some light upon the fairness and accuracy of the appraisal submitted. The investment account as it appears on the books of the company, after making certain adjustments therein which in the opinion of our accounting department should be made, amounts to \$43,254,437. These adjustments, among other things, deduct from the book value the amounts set aside to cover accrued depreciation and retirements not charged off, which amount approximately to \$6,800,000.

There is no probability that the increased revenue necessary will be realized from increased traffic on the system. The reports on file show that the gross revenue for the year 1917 was less than that of 1916, and for the first four months of operation in 1918 there was a considerable falling off in travel from the corresponding months in 1917. This company is not unique in this experience, as the records of all companies operating in this District show a decrease in traffic in the last few years. There seems to be no escape from the conclusion that the increase in revenue necessary to enable this road to continue in operation must come from an increase

Vol. VII.

in fares, and although that will cause annoyance and displeasure to the great body of the people who will have to pay the increased fares, we have sufficient confidence in the fairmindedness of the American people to believe that they are perfectly willing to pay the legitimate cost of the service which they require.

In our treatment of the question of how the needed revenue can be raised we are embarrassed by the limitation of our authority in this proceeding, and also by the failure of the parties to present for consideration all the facts necessary for the consideration of the problem as a whole. We must perforce decide this case upon the record before us, and endeavor to give such relief as is justified by that record, within the limitations of our authority; but the result can be but fragmentary and a makeshift, and can not be considered as a comprehensive scheme of rates which will produce the required revenue and do exact and equal justice to each community served.

While it is clear from an examination of the whole condition of the company that an increase in return is imperative, it does not necessarily follow that the relief should be obtained from a horizontal increase in fares. The system operated by this company is very extended and very complex. It comprises urban, suburban, and interurban lines, the circumstances of all of which are different. In the case of the urban lines, where the fare is a flat five cents, we are compelled by virtue of section 181 of the Railroad Law fixing that rate, to determine in the case of each municipality affected that the statutory rate in that municipality is unjust and unreasonable. That requires an examination of the operations of the road in each municipality as if it were a separate road, and no increase can be granted unless the operations there warrant it. In other words, if the operations of the road in one community are such as to afford a fair return upon the value of the property used for such service, no increase of the fare would be justified, although because

of the fact that operations in other communities are conducted at a loss, the company is not receiving a fair return or no return at all upon invested capital. It is not fair that one community should be compelled to pay for the service rendered to another. This principle was well stated by the Public Service Commission of the First District *In re Long Island R. Co.*, P. U. R. 1918 A, 660, as follows: "The insufficiency of revenue from the passenger service as a whole does not demonstrate that a particular division of service or a particular class of service should provide the additional revenue, without showing further what is the basis of the rates as a whole or in different divisions or classes of passenger service, and which particular division or class should bear a calculated increase in rates."

But this rule should not be carried to an extreme. If one line in a city system should be shown to be operated at a profit and another line at a loss, that does not necessarily mean that the rate should be increased on one line and not on the other. The unit fare for street railroad riding in cities has become so firmly fixed in practice that it would cause too violent a disruption to adjust rates in that manner, even though it should be considered theoretically just. The most workable plan will probably be to treat each municipal system as a whole, and let the lines located in the more populous sections help to carry those which for the time may prove to be unprofitable.

Neither is it feasible to fix the limits by the geographical boundaries of the different municipalities. It is common knowledge that the actual limits of a community are not bounded by its geographical lines, and that in the case of all our cities there is adjacent territory peopled for the most part by those doing business in the city and all forming a part of the one community. In such cases it may be fairly said that it is an impossibility in practical operation to separate the accounts to show accurately the revenues, the expenses of operation, or even the investment in property used in the service.

The Syracuse division of the New York State Railways is a typical instance of such a condition. The lines of railway radiate from the business center of the city out to the residential section in all directions. Some of them extend to territory beyond the city line which is thickly populated. On the west is the village of Solvay, and on the east the village of Eastwood, with only the city line cutting them off from the city. Farther to the east are the villages of East Syracuse and Minoa, and to the north the village of Liverpool, with but a short space intervening between the municipalities, and that space quite generally built up along the railway lines connecting them. This whole territory is operated as a single fare zone, and one fare is the price paid for a continuous trip between any two points therein. The only practicable way is to treat this system as a whole, and to dispose of the question of the rate of fare upon the basis of the results as shown from the operation of the system.

In the matter of the valuation of the property used in the service, in the Syracuse division, according to the inventory and appraisal in evidence, which has been directly allocated, the flat field cost of tangible property amounts to \$7,514,600.03. The amount added for omissions, preliminary expenses, legal expenses, administration, taxes and interest during construction is \$2,324,539.09; and for working cash capital, cost of financing, and going concern value is \$2,013,774.63. No effort was made to segregate the actual items going into these latter figures as applicable to the Syracuse district alone, but they were derived by dividing the total amounts set up for the whole system by the proportion that the field cost of tangible property of the Syracuse division bears to the total cost of such property of the whole system.

We have apportioned the interest bearing debt upon the same basis, the proportion for the Syracuse division being 22.38 per cent. Upon this basis the amount of the interest bearing debt fairly apportionable to the Syracuse district

is \$5,971,135, which is considerably less than the flat field cost of the tangible property according to the appraisal as given above.

The operating revenue from the Syracuse division is capable of accurate ascertainment from the books, being for the year 1917 \$1,990,899. The total operating expenses of the Syracuse division for the same period amounted to \$1,334,402. Taxes for the year amount to \$113,735. Adding non-operating income \$2360, and deducting rentals paid \$15,067, leaves net railway income before charging interest \$539,955. Certain adjustments, which should be made as indicated in the reports of the accountants, leave this net income \$525,560. The interest attributable to the Syracuse district upon the proportion used above is \$288,228. The proportion of the increased amount which should be set apart for reserve for depreciation is \$84,901, and the share of the increased wages and other operating expenses is \$245,739, indicating a probable deficit for the year of \$93,308, or if the amount for increased depreciation reserve be ignored, of \$8407. Upon that showing a case is made where the statutory rate is unjust and should not be permitted to stand.

The probable increase in revenue in the Syracuse division from a six cent fare, assuming a 10 per cent falling off in number of fares collected, which experience shows is the probable result of a fare increase, would be \$152,026 per annum, based upon the 1917 traffic. This would leave but \$58,718 to provide for contingencies and errors in assumption after paying interest, operating expenses, and taxes, which under none of the bases assumed for fixing valuation of property used in the service can be called an undue return if the Syracuse division should be alone considered.

We have also concluded to treat the Utica division as one system. While there is included in this division the interurban line between Rome and Little Falls, in view of the fact that interurban operation is much less costly than

Vol. VII.

city operation, and on account of the many munition factories along this interurban line and the heavy traffic occasioned thereby, we may reasonably assume that the inclusion of the results of operation of this comparatively short interurban line will be rather more helpful to the urban operation than otherwise. We will, therefore, not require the performance of the laborious and almost impossible task of allocating the items of the accounts between the urban and the interurban portions of this system.

The figures for the Utica system are as follows: The field cost of the property used in the service directly allocated, taken from the appraisal already referred to, is \$7,375,523. The addition of intangibles of the first group is \$2,321,218, and of the second group \$1,978,152. These figures were arrived at by the same method as previously described with reference to the Syracuse division, the proportion however being in this case 22.05 per cent. The amount of the interest bearing debt which should be apportioned to the Utica district is \$5,982,888, much less than the bare field cost of the tangible property.

For the year 1917, according to the books, the operating revenue was.....	\$1,744,575
Operating expenses.....	<u>1,127,080</u>
	\$617,495
Taxes.....	<u>116,664</u>
	\$500,831
Non-operating income.....	<u>2,671</u>
	\$504,502
Rental deductions.....	<u>16,730</u>
Net railway income before charging interest.....	\$487,772

Proper adjustments made by our accountants bring this figure to \$492,065. The interest on indebtedness for the Utica district is \$283,978. Its proportion of the increased depreciation reserve is \$89,464, and its share of increased wages and operating expenses is \$320,451; indicating a probable deficit for a year's operation of \$201,828.

The probable increase in revenue from the increase in fare in the city of Utica, assuming a 10 per cent falling off in fares as in the case of the Syracuse district, amounts to

318 PUBLIC SERVICE COMMISSION, SECOND DISTRICT

P.S.C. 2d D.

\$91,963, which will still leave the income short by the sum of \$109,865, of enough to pay operating expenses and fixed charges on the Utica division alone.

If the increase from five to six cents should be granted in both Utica and Syracuse, the road will still fail to earn its operating expenses and fixed charges for the whole system by the sum of \$313,774.

The following table contains a statement showing in detail the probable results which have been summarized above.

NEW YORK STATE RAILWAYS

319

Vol. VII.

CONSTRUCTIVE INCOME STATEMENT SHOWING PROBABLE EFFECT OF FARE INCREASES ON RATE OF RETURN UPON
DIFFERENT RATE BASES.

	All lines	Syracuse lines	Utica lines
Adjusted railway operating income year ended December 31, 1917, applicable to properties included in investment below used.....	\$2,130,621	\$525,560	\$492,065
Less additional depreciation allowance.....	374,733	84,901	80,464
Less additional expense due to increased costs since 1917.....	\$1,755,888	\$440,659	\$402,801
Plus additional revenue from 6 cent fares in Syracuse and Utica districts, assuming a 10% falling off in number of fares collected.....	1,028,718	245,739	320,451
Available for return on capital invested.....	\$730,120	\$194,920	\$82,150
Adjusted book investment (including investment in leased properties) less adjusted reserves.....	243,989	152,026	91,963
Interest charges.....	\$974,109	\$346,946	\$174,113
Interest on above.....	\$43,254,427	\$9,676,717	\$9,533,882
Investment represented by bonds alone.....	2,25%	3.56%	1.83%
Rate of return on above.....	\$24,690,500	\$5,525,734	\$5,444,245
Interest charges.....	3,957%	6.29%	5.30%
Net corporate income available for dividends or other corporate purposes, including amortization of replacement suspense required by Commission's order in case No. 4836, at rate of \$100,000 per annum (\$150,000 in 1920 and thereafter).....	\$1,287,883	\$288,228	\$283,978
Capital stock outstanding.....	\$4313,774	\$58,718	*\$108,865
Ratio of net corporate income to capital stock.....	\$23,807,500	\$5,328,119	\$5,249,554
Reproduction cost, P. McC. & C. appraisal, total to December 31, 1917, less adjusted reserve for accrued depreciation.....	.....	1.10%	.....
Rate of return on above.....	\$46,122,326	\$10,320,987	\$10,165,130
Reproduction cost, P. McC. & C. appraisal, to December 31, 1917, excluding "Cost of financing" and "Going concern value," less adjusted reserve for accrued depreciation.....	2.11%	3.38%	1.71%
Rate of return on above.....	\$37,330,222	\$8,352,869	\$8,225,782
		2.61%	2.12%

* Deficit.

While the proposed relief is not adequate to the absolute needs of the railroad company, in that it will not provide sufficient revenue for the actual out of pocket requirements of the company, it seems to be all that the Commission, with the limited power which it possesses in this case, can grant. We are prevented by the writ of prohibition from giving any relief whatever so far as the Rochester operation is concerned; and by the terms of the waiver of the franchise restriction in the Utica case we are limited to an increase to not more than six cents. While so far as Syracuse is concerned we are not limited as to amount, we are far from being convinced that we should compel the Syracuse division to bear the whole load, and have decided that the increase there should not be more than the increase in Utica.

The application for an increase in fare from five cents to six cents in the cities of Syracuse and Utica should be granted.

Inasmuch as the relief herein granted is to meet an emergency caused by the abnormal conditions arising out of the present war, the rates thus permitted should continue only during the war, and until such time thereafter as such conditions shall continue to exist; and either party may at any time after the signing of the treaty of peace make an application to reopen the proceeding, to the end that the case may be reexamined and proper and just rates fixed.

All concur.

In the Matter of a Schedule of Passenger Fares Filed by
ALBANY SOUTHERN RAILROAD COMPANY with this Com-
mission July 5, 1918, and complaint in reference thereto.
[Case No. 6568.]

While the voluntary and lawful establishment of a certain method of charging fares on an interurban railroad, and its continuance in force for a period of years, does create equities of a sort which the company can not lightly disregard, no such equities can be justly advanced as ground for the contention that a public utility must be required to do business at a loss.

Decided November 26, 1918.

Appearances:

Randall J. LeBoeuf, Albany, for the Albany Southern Railroad Company.

George H. Witbeck of Nassau, address 74 Chapel street, Albany, for the complainants.

HILL, Chairman:

This is a complaint made by a number of patrons of the Albany Southern Railroad Company against the reasonableness of the rate specified in a certain tariff filed by the company with this Commission on the 5th day of July, 1918, and now under suspension by order of the Commission. The Albany Southern railroad is an electric street railroad extending from Albany to Hudson in the State of New York, a distance of about thirty-eight miles; of this about seventeen miles is double track, and the entire single track length of the road is 61.98 miles including sidings. It is of the interurban class, built almost entirely on private right of way, and all of its revenue, except a small portion, about \$8000; secured from local traffic in the city of Hudson, comes from interurban fares. It appears that the regular fare since March 27, 1913, has ranged from 1.47 cents to 3 cents per mile, and the proposed increase, as shown in the

322 PUBLIC SERVICE COMMISSION, SECOND DISTRICT

P.S.C. 2d D.

tariff filed July 5th, creates a new rate per mile, ranging generally from 2 cents to 3 cents, while the increase in commutation fares as shown in said tariff is 10 per cent, or about at the rate of 1.1 cents per mile.

Exhibit A attached hereto shows the results from the operation of the railroad for the three years ended December 31, 1915, 1916, and 1917, and for the nine months ended September 30, 1918. These figures include both interurban operations and those in the city of Hudson. This statement has in the main been prepared by the company, but it follows very generally, and where reporting periods coincide, the results shown in the annual reports filed with this Commission each year. The one exception is in the matter of taxes which the company has never segregated between its various departments, a segregation having been made in this instance for the purpose of the calculations necessary in this case. This segregation is necessarily upon an estimated basis, but within reasonable limits the statements are believed to show the proportion of all of the taxes paid by the company which are applicable to its electric railroad operations.

Exhibit B comprises an estimate which has been prepared and which is included to show an estimated income account for one calendar year following the adoption of the new rate schedule, and assuming that increased operating costs already incurred or reasonably in prospect will continue throughout that entire period. Generally this Exhibit B is believed to be self explanatory.

In both exhibits an effort has been made to exclude both revenues and expenses resulting from the ownership and operation by the company of the toll bridge between Albany and Rensselaer. In Exhibit A all revenues and all direct operating expenses have been excluded, but it is probable that the remaining operating expense accounts include some items which, if a strict analysis was made, would be applicable to the bridge rather than to the remaining property.

Vol. VII.

It is not believed, however, that these amounts are sufficiently great in the aggregate to affect the substance of any of the calculations made or the conclusions reached hereinafter. In Exhibit B an effort has been made to exclude the toll bridge operations entirely, even to the extent of making allowances in said calculations for the estimated amount of maintenance necessary.

Assuming that Exhibit B is a reasonably correct presentation of the probable income, both gross and net, of the company for a calendar year following the adoption of the new rate schedule, the amount available for interest, dividends, surplus, and contingencies, after all operating costs except interest have been paid, will be \$12,700.

The accounts of the Albany Southern Railroad Company have been examined on at least two occasions in the past, one occasion having been quite recent, and the Commission has in its files definite figures showing the extent of the claimed investment in the property of the company. These figures show that at June 30, 1917, the total claimed investment in the electric railroad department, including the toll bridge, was \$3,046,629.49, and that of this \$670,297.02 represents the investment in the toll bridge itself, leaving \$2,376,332.47 as the company's investment in its electric railroad property. The actual figure is probably somewhat higher than this at the present time, due to additional investment which has probably been made since June 30, 1917.

The company's outstanding capital obligations at December 31, 1917, comprise the following:

First preferred stock.....	\$2,029,000
Common stock.....	1,375,000
Total capital stock.....	\$3,404,000
First mortgage 30-year bonds.....	1,477,000
A total par and face amount of capital securities amounting to.....	\$4,881,000

the stock making up approximately 70 per cent of this and the bonds accounting for the remaining 30 per cent.

If it is reasonable to assume that all of the company's property was purchased with moneys procured generally

324 PUBLIC SERVICE COMMISSION, SECOND DISTRICT

P.S.C. 2d D.

from the sale of all of these securities, and that neither stock nor bonds are applicable to any particular or selected portions of the property nor to any particular department thereof, it would follow that the actual cost figure in the electric railroad department, *i. e.* \$2,376,332.47, should be treated as follows:

(a) Derived from sale of capital stock, 70%.....	\$1,663,432.73
(b) Derived from sale of first mortgage bonds, 30%.....	712,899.74
	<hr/> <u>\$2,376,332.47</u>

For the year ended December 31, 1917, the amount paid by the company in interest upon its bonds aggregated the sum of \$74,105, and in addition it charged off bond discount in the amount of \$8055.60, making a total amount of interest paid and discount accrued aggregating \$82,160.60, or the equivalent of 5.56 per cent upon the \$1,477,000 face amount of bonds outstanding.

The \$12,700 of estimated net income following the rate increase is equivalent to 0.53 per cent of the \$2,376,332.47 of claimed original cost, and an equivalent of 1.78 per cent upon the estimated proportion of such costs derived from the sale of bonds, *i. e.* \$712,899.74. In other words, it appears that following the rate increase the Albany Southern Railroad Company's electric railroad department will earn 1.78 per cent per annum toward the interest rate of 5.56 per cent per annum which it will be obliged to pay upon the bonds issued against the property devoted to the uses of that department.

ALBANY SOUTHERN RAILROAD CO.

325

Vol. VII.

EXHIBIT A
ALBANY SOUTHERN RAILROAD COMPANY
INCOME ACCOUNT

	Year ended 12/31/15	Year ended 12/31/16	Year ended 12/31/17	Nine months ended 9/30/18
	Dollars	Dollars	Dollars	Dollars
Total revenue from transportation (not including toll bridge).....	237,752.65	248,288.74	247,497.27	197,278.65
Total other revenue.....	9,312.74	7,337.03	5,068.96	2,835.19
Gross operating revenue (excluding toll bridge).....	247,065.39	253,625.77	252,566.23	200,163.84
Non-operating income.....	2,484.16	2,348.02	3,608.33	3,746.02
Gross income.....	249,549.55	255,973.79	256,074.56	205,910.46
Total operating expenses (including toll bridge expenses).....	216,670.70	231,052.13	242,324.22	173,008.27
Toll bridge expenses (which can be specifically allocated).....	7,157.93	7,745.91	8,316.74	6,859.00
Total operating expenses (excluding toll bridge expenses).....	209,512.77	223,306.22	234,007.48	169,149.27
Net operating revenue (excluding toll bridge direct expenses).....	40,036.78	32,567.57	22,087.08	36,761.19
Taxes and fixed charges (excluding interest):				
Taxes (estimated):				
Track and terminal privileges.....	20,400.00	20,900.00	19,100.00	17,100.00
Hire of equipment.....	4,998.59	7,062.07	7,929.82	5,875.00
Joint facility rents.....	5,199.10	7,130.48	7,869.34	5,608.17
Miscellaneous rent deductions.....	1,690.54	745.94	... 19,62	... 32.91
Total fixed charges.....	32,377.90	35,588.11	34,963.07	28,463.17
Amount available for interest, dividends, surplus, and contingencies.....	7,658.88	*3,220.54	*12,894.99	8,278.02

* Deficiency.

326 PUBLIC SERVICE COMMISSION, SECOND DISTRICT

P.S.C. 2d D.

EXHIBIT B

ALBANY SOUTHERN RAILROAD COMPANY (RAILROAD DEPARTMENT
TOLL BRIDGE EXCLUDED) ESTIMATED INCOME ACCOUNT, ONE
CALENDAR YEAR*(Assuming increased rates and increased operating costs now in prospect)*

Operating Revenues:	
Passenger revenue.....	\$205,000.00
Freight revenue	90,000.00
Other revenue from transportation.....	12,000.00
Non-transportation revenue.....	4,000.00
Total revenues.....	\$311,000.00
Non-operating income.....	7,500.00
Gross income.....	\$318,500.00
Operating Expenses:	
Maintenance of way and structures (inc. depreciation).....	\$50,000.00
Maintenance of equipment (inc. depreciation).....	31,000.00
Traffic.....	5,500.00
Conducting transportation.....	139,000.00
General and miscellaneous.....	42,000.00
Total operating expenses.....	267,500.00
Net operating revenue.....	\$51,000.00
Taxes and Fixed Charges:	
Taxes.....	\$22,800.00
Track and terminal privileges.....	8,000.00
Hire of equipment.....	7,500.00
Joint facility rents.....	
Miscellaneous rent deductions.....	
Total fixed charges and taxes.....	38,300.00
Amount available for interest, dividends, surplus, and contingencies.....	\$12,700.00

Under these circumstances, considering that the bond issue per mile of track averages less than \$12,000, which must be conceded to be very much less than cost, it is obvious that a fair rate of return can not possibly be secured from the new rates, and it thus becomes unnecessary to attempt to fix a valuation of the property of the company used and useful in the public service as a basis for a fair return.

The complainants' contention is that in years past the company has induced many residents of Albany to locate in the country on the line of its road by the establishment of a much lower fare than is now proposed, and in justice to that class of patrons request that the company should now be compelled to continue such low rates notwithstanding that they have been proved unprofitable. In effect, the contention is that the facts referred to are a basis for holding the company to an implied agreement to continue indefinitely

an unprofitable and inadequate rate schedule on the ground that its business has been built up on such a schedule.

Obviously, from the examination which has been made, grave question exists whether or not the company can earn sufficient revenue on the new schedule or upon any basis whatever ultimately to survive. So far as the patrons of the road are concerned, the practical question would seem to be not so much whether the proposed rates are reasonable as whether or not on any rates whatever which might be adopted the road can long continue to operate. It could not possibly benefit them to compel rates of fare which would lead to inevitable discontinuance of all operation. Even had a contract been made with the patrons fixing the rates, it would not be binding on the Commission. (*Buffalo East Side R. R. Co. v. B. S. R. R. Co.*, 111 N. Y.; Railroad Commission cases, 116 U. S. 307.) It is true that the voluntary and lawful establishment of a certain method of charging, and its continuance in force for a period of years, does create equities of a sort which a company ought not to disregard lightly. But clearly no such equities can be justly advanced as ground for the contention that a public utility must be required to do business at a loss; and in view of the impossibility, even with the proposed increase, of securing a fair return on investment, the complainants' contention seems not entitled to weight.

There are some features of the tariff as filed which are in violation of the statutes, and these features must be eliminated. For example, the proposed one-way fares would apply only to the transportation of the passenger. Separate charges are proposed to apply to the transportation of baggage, namely 50 cents each for trunks, and 15 cents each for suit cases. This company may charge 3 cents a mile for a person traveling more than one mile, under section 57 of the Railroad Law, as compensation to be paid for transporting any passenger and his baggage not exceeding 150 pounds in weight. A passenger with baggage in a trunk and of weight

not exceeding 150 pounds, traveling between any two points where the proposed passenger fares are less than 70 cents, would be required to pay more than the statute permits the company to collect, as the following few examples will show:

<i>From</i>	<i>To</i>	<i>Miles</i>	<i>Proposed passenger fare</i>	<i>Proposed baggage charge</i>	<i>Total</i>	<i>Charge at 3 cents per mile</i>
Albany	Elliott's	5	\$0.15	.15	\$0.65	\$0.15
Albany	Kelcey's	10	.30	.50	.80	.30
Albany	Sweets	15	.45	.50	.95	.45
Albany	Niverville	20	.55	.50	1.05	.60
Albany	Kilmer's	25	.65	.50	1.15	.75

The foregoing table also discloses that where the distance is 5 miles the proposed fare varies, as to rate per mile, from 2 to 3 cents; and where the distance is 10 miles, the variation in rate per mile is from $2\frac{1}{2}$ to 3 cents; and where the distance is 15 miles, from 2.67 to 3 cents; and where the distance is 25 miles, the variation in rate per mile runs 2.6, 2.8, and 3 cents.

In addition to the foregoing, the one-way passenger fares proposed to apply from Albany to Hudson and intermediate points, when computed on a mileage basis to which the company is entitled, show as follows:

<i>When proposed fare is</i>	<i>Rate per mile approximately is</i>	
	<i>For minimum haul</i>	<i>For maximum haul</i>
10¢	5.¢	2.¢
15¢	3.¢	2.5¢
20¢	3.¢	2.5¢
25¢	2.8¢	2.5¢
30¢	3.¢	2.7¢
35¢	2.9¢	2.7¢
40¢	3.¢	2.85¢
45¢	3.¢	2.60¢
55¢	3.¢	2.6¢
60¢	2.7¢	2.5¢
65¢	2.6¢	2.4¢
70¢	2.4¢	2.3¢
75¢	2.4¢	2.¢

Section 36 of the Public Service Commissions Law, among other things, provides —

Long and short hauls.— It shall be unlawful for any common carrier subject to the provisions of this chapter to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensa-

Vol. VII.

tion as a through rate than the aggregate of the intermediate rates subject to the provisions of this chapter; . . .

Examination of the proposed one-way fares discloses that while the company does not propose to charge more for shorter than for longer distances, it does in numerous instances propose to charge a greater compensation as a through rate than the aggregate of the intermediates.

Violations of sections 57 of the Railroad Law and 36 of the Public Service Commissions Law are clearly indicated in the foregoing, and they are of such nature as is declared in such statutes to be unlawful.

The provisions of sections 31 and 32 of the Public Service Commissions Law prohibit discrimination when unjust, and preferences when unreasonable. The one-way fares proposed are both discriminatory and preferential as the varying rate per mile tables herein show.

Round-trip ticket fares, charges for 25-ride family and 50-ride commutation tickets, to be just and reasonable, should be on some basis having a fixed relationship to the one-way fares; and as the one-way fares proposed on account of the violations of statutory requirements as pointed out may not be made effective, it follows that such round-trip fares and ticket charges must also be revised.

The tariff as filed and which is now under suspension will therefore be canceled. A tariff in which the objections above pointed out have been removed, and which will yield results of the same approximate amount, has been prepared and will be attached to the order to be entered in this proceeding. Such tariff is approved, and may be filed by the company on one day's notice, effective not earlier than December 1, 1918, together with a commutation rate tariff which will advance those rates 10 per cent, namely from 1 cent to 1.1 cents per mile.

An order may be entered accordingly.

All concur.

Petition of **FONDA, JOHNSTOWN AND GLOVERSVILLE RAILROAD COMPANY** under subdivision 1, section 49, Public Service Commissions Law, for permission to increase passenger fares. [Case No. 6080.]

Decided November 27, 1918.

Appearances:

Frank Burton, Gloversville, N. Y., for the applicant.

Clarence W. Smith, Mayor, and *Borden D. Smith*, City Attorney, for the City of Johnstown.

Seely Conover, Mayor, and *Christopher J. Heffernan*, City Attorney, for the City of Amsterdam.

Wesley H. Maider, City Attorney, for the City of Gloversville.

FENNELL, Commissioner:

The Fonda, Johnstown and Gloversville Railroad Company petitioned for a one cent increase of fare in the cities and incorporated villages served by it.

The company operates the following lines that would be affected by the proposed increase:

Gloversville-Johnstown Line, which runs from the corner of Main and Fulton streets in Gloversville (where it connects with the Gloversville Belt Line) to and into Johnstown, passing over North Perry street, North Market street and William street in the latter city, the length of the route being 4.28 miles.

The Gloversville Belt Line operates solely within the city of Gloversville along North Main street, State street, Kingsboro avenue, Northern Boulevard, Eastern Boulevard and East Fulton street, the length of the route being 3.84 miles.

The Amsterdam Local Line runs from the village of Fort Johnson on the west to the easterly boundary of the city of Amsterdam on East and West Main streets, Division street and the Mohawk turnpike. The length of the route is 8.08 miles.

FONDA, JOHNSTOWN AND GLOVERSVILLE R. R. Co. 331
 Vol. VII.

The Rockton Belt and Hagaman Line includes the belt line in the city of Amsterdam, running in an irregular manner over a number of streets and a line from the north-erly terminus of the belt to Harrowers and from there north to Hagaman. The length of this route is 5.77 miles.

The fare in Gloversville and in Johnstown is 5 cents but the ordinary fare from one to the other is 10 cents, five trip tickets also being sold at reduced rates for transportation during certain designated hours daily except Sundays.

Following is a tabulation showing (a) investment, (b) stocks and bonds and (c) income and expenses of these lines:

(a) Average investment (1917) in each operating sub-division comprising estimated cost of physical property plus 12 per cent overhead:

Gloversville Belt Line	\$221,850.87
Gloversville-Johnstown Lines (excluding Belt Line).....	<u>286,357.25</u>
Gloversville-Johnstown City Lines (all).....	\$508,208.12
Amsterdam City Lines.....	399,021.68
Amsterdam-Rockton Belt and Hagaman Line.....	<u>454,787.69</u>
Total all City Lines.....	\$1,362,017.49

These figures are supported by actual records and have been checked by the Commission's accountants.

(b) Assuming the costs of these properties to have been paid from moneys derived from the issue of stock and bonds respectively in the ratio which the amount of such stocks and bonds bear to the total amount of capital securities of the corporation the division is as follows:

	Bonds 70%	Preferred stock 5%	Common stock 25%	Total
Gloversville Belt Line	\$155,000	\$11,000	\$56,000	\$222,000
Gloversville-Johnstown Lines (excluding Belt Line).....	200,000	14,000	72,000	286,000
Gloversville-Johnstown City Lines (all).....	\$355,000	\$25,000	\$128,000	\$508,000
Amsterdam City Lines.....	279,000	20,000	100,000	399,000
Amsterdam-Rockton Belt and Hagaman Line.....	319,000	23,000	113,000	455,000
Total all City Lines.....	\$953,060	\$68,000	\$341,000	\$1,362,000

(c) Estimated income account for one year under the new rates, using 1917 as a basis, providing adequate accruals for depreciation and deducting assigned interest requirements (see [b] above):

332 PUBLIC SERVICE COMMISSION, SECOND DISTRICT

P.S.C. 2d D.

	Gloversville Belt Line	Gloversville- Johnstown Lines (etc. Belt Line)	Gloversville- Johnstown City Lines (all)	Amsterdam- City Lines	Amsterdam- Rockton Belt and Hannan Line	Total all City Lines
\$6,655.41	\$23,917.40	\$30,472.81	\$8,060.26	\$9,372.22	\$47,905.29	
3,669.04	*1,758.97	5,458.01	7,339.56	8,105.45	21,903.02	
\$10,254.45	\$25,676.37	\$35,933.82	\$15,390.82	\$17,477.67	\$68,808.31	
5,381.88	6,941.91	12,323.79	9,691.32	10,888.06	32,703.17	
\$4,872.67	\$18,734.46	\$23,607.03	\$5,708.50	\$6,789.61	\$36,105.14	
7,068.00	9,120.00	16,188.00	12,722.40	14,546.40	43,456.80	
<i>Amount available for increased operating expenses and taxes, and for dividends, surplus, and contingencies</i>	<i>\$8,196.43</i>	<i>\$8,814.46</i>	<i>\$7,419.03</i>	<i>\$7,015.80</i>	<i>\$7,756.79</i>	<i>\$7,551.66</i>

* This does not include any additional amount to follow increase in workmen's tickets from 5 cents to 6 cents.
 Figures in italics show deficits.

FONDA, JOHNSTOWN AND GLOVERSVILLE R. R. Co. 333

Vol. VII.

In all our cities there are individual lines that do not pay, but they are not segregated from the paying lines so that a higher rate of fare may be charged on the non-productive lines. The Gloversville Belt Line is such a line and it must be taken as part of the Gloversville system. Gloversville and Johnstown, adjoining each other as though parts of the same city, and the Gloversville Belt Line being part of the Gloversville system, we may treat the Johnstown-Gloversville Lines, including the Gloversville Belt Line, together.

The following tabulation shows the net revenues of these lines for the year ended June 30, 1917, and the ratio that such revenues bear to the average 1917 investment:

	<i>Railway operating income</i>	<i>Rate of return on average investment including 12% overhead</i>	<i>Rate of return on average investment excluding 12% overhead</i>
Gloversville Belt Line.....	\$6,555.41	2.95	3.16
Gloversville and Johnstown City Lines (excluding Gloversville Belt).....	23,917.40	8.35	9.11
Gloversville and Johnstown City Lines (including Gloversville Belt).....	30,472.81	5.00	6.48
Amsterdam City Lines.....	8,060.26	2.02	2.13
Amsterdam-Rockton Belt and Hagaman Line.....	9,372.22	2.06	2.18
Combined City Lines.....	47,905.29	3.52	3.75

From the foregoing it will be seen that the Gloversville and Johnstown City Lines (including the Gloversville Belt Line) show a reasonable return on investment; all the other lines show a return considerably below reasonable.

Considering the question from the railroad operating angle rather than the investment angle, tabulation (c), above, shows that after payment of fixed charges the Gloversville Belt Line will have a deficit of \$2195.43, the Amsterdam City Lines a deficit of \$7013.90, Amsterdam-Rockton Belt and Hagaman Line a deficit of \$7756.79, the Gloversville-Johnstown Lines (excluding the Gloversville Belt Line) a net profit of \$9614.46, (including the Gloversville Belt Line) a net profit of \$7419.03. All of which shows that the year's business will produce an estimated loss to the railroad company of \$7351.66 if the City of Amsterdam will

waive the franchise restriction hereinafter referred to. If this is not done the loss on the Amsterdam City Lines including Rockton Belt but excluding the Hagaman-Harrowers Line will be \$29,223.88 and upon all the city lines it will be \$21,804.85. The net increase on Hagaman-Harrowers Line not affected by the franchise restriction will be \$991.82

The petition for an increase of fare is based on the necessity of having enough income to meet operating expenses and fixed charges and not upon any theory of reasonable return

The above tabulations show that the present five cent fare is insufficient to yield reasonable compensation for the service rendered and is unjust and unreasonable. An increase of one cent, from a five cent to a six cent fare, is allowed, the increase to continue during the present period of high prices and subject to change when the facts shown warrant same

A franchise restriction as to portion of a line in the city of Amsterdam prevents the inclusion of all the Amsterdam lines in the fare increase. On November 19, 1901, the Amsterdam Street Railroad Company received a franchise from the City of Amsterdam wherein the railroad company was to extend its railroad over West Main street from where West Main street intersects Guy Park avenue, thence easterly along West Main street to Bridge street. This franchise was limited to fifty years and contained, among other provisions, the following:

Fourth.—The fare on the cars of said company from any point on West Main street to any point within the corporate limits of said city shall not exceed 5 cents per capita.

Fifth.—Upon the payment of one fare on any branch of the Amsterdam Street Railroad Company within the city of Amsterdam, a transfer for a continuous ride on a connecting car to any point within the city limits shall be issued by said company to any person demanding the same and shall be accepted by said company and its successors for such continuous ride.

In view of this franchise restriction, it will be necessary for the railroad company to put into effect such a schedule of rates in the city of Amsterdam as will not conflict therewith unless the city waives the restriction. Under these cir-

FONDA, JOHNSTOWN AND GLOVERSVILLE R. R. Co. 335
Vol. VII.

cumstances the railroad company may file a schedule, under a short notice if desired, adjusting its rates in Amsterdam in accordance with the increase granted and the franchise restrictions.

All concur.

336 PUBLIC SERVICE COMMISSION, SECOND DISTRICT
P.S.C. 2d D.

In the Matter of Service Furnished by CENTRAL HUDSON
GAS AND ELECTRIC COMPANY under its "Optional
Service" Rate for Electricity. [Case No. 6510.]

An electrical corporation must serve all consumers of the same classification equally, and any rate made by it which permits it at its option to discontinue service to one of a class while continuing it to another of the same class is unlawful.

Decided November 27, 1918.

Appearances:

Leon H. Scherck, Poughkeepsie, N. Y., for the Central Hudson Gas and Electric Company.

R. H. Clark, Poughkeepsie, N. Y., for the Pioneer Pearl Button Company.

CHENEY, Commissioner:

The Pioneer Pearl Button Company of Poughkeepsie made a correspondence complaint against the Central Hudson Gas and Electric Company, alleging that it was a consumer of electricity furnished by said electric company under what was known as its optional service rate, and that it had been notified by the electric company that it would cease to furnish it with electricity under that classification, but that if it desired to continue taking electricity it must do so under another service classification. After certain correspondence an order was issued requiring the electric company to appear before the Commission and show cause why its action in the matter should not be adjudged discriminatory and unlawful, and why it should not be ordered to cancel its optional service classification or to furnish service thereunder to all customers applying therefor who might be entitled to such service.

Upon the hearing it appeared that the Pioneer Pearl Button Company had for a number of years been furnished electricity under the so called optional service classification

and that other consumers were also furnished with electricity by the company under that classification; that the electric company now proposes to discontinue service to the Pearl Button Company under that classification; that it does not propose to cancel such classification but intends to continue furnishing other consumers thereunder; and asserts that it has the right so to do under the tariff as filed. There can be no doubt that such proposed action on the part of the electric company would be an unjust discrimination. The rule applicable was laid down by this Commission in Case No. 5763, *Customers of the Newfane Electric Company against Newfane Electric Company*, decided October 3, 1918, as follows:

All customers of the same class are entitled to the same treatment, and no contract can be made with one customer which gives a preference or an advantage which all do not receive.

It appears from the tariff on file that in service classification No. 8, which is the classification providing for the optional service, there is included this special rule: "Service under this classification may be suspended at option of the company." This rule is unlawful in that it permits this unjust discrimination, and therefore is no justification for the proposed act of the company.

It is probable that this classification is included in the tariff to permit the company to dispose of surpluses of electric energy which it may have at intermittent periods. It should be permitted to establish a classification which will enable it to market such surplus when there is a surplus and to discontinue furnishing it when the surplus is no longer available. There can be no objection to such a classification, provided the rules governing it be so definite that they will not permit of discrimination between consumers in the same class. This can be accomplished by defining optional service in the tariff as filed to mean service to be rendered or discontinued for periods at call of either the producer or consumer, provided that whenever the producer discontinues optional service to one consumer it shall

338 PUBLIC SERVICE COMMISSION, SECOND DISTRICT

P.S.C. 2d D.

at the same time discontinue such service to all optional service consumers.

An order should be entered requiring the Central Hudson Gas and Electric Company to continue to furnish the Pioneer Pearl Button Company with electricity under its optional service rate so long as it furnishes service under that classification to any other consumers, and directing that it should either cancel its optional service classification in its tariff now on file or that it amend the same for the purpose of defining the term "optional service" in accordance with the views herein set forth.

All concur.

SHIPPIERS, HIMROD, v. PENNSYLVANIA R. R. Co. 339

Vol. VII.

In the Matter of the Complaint of SHIPPERS OF HIMROD STATION, Yates county, against THE PENNSYLVANIA RAILROAD COMPANY as to proposed discontinuance of station. [Case No. 6579.]

The question whether the President derives his authority over the railroads by reason of the fact that he is Commander in Chief of the Army and Navy under the Constitution, or whether he does or can derive such power from any act of Congress, will not be determined because the Director General is acting under United States statutes which do not assume to take away or limit the police powers of the State.

The State has power to regulate even an interstate railroad in the management of its stations and to prevent interference with the convenience of the public, provided such regulation does not interfere with powers which the United States Government has lawfully assumed.

Decided November 27, 1918.

Appearances:

Hon. Gilbert M. Baker of Penn Yan, N. Y., for the complainants.

Alexander Diven, Esq., of Elmira, N. Y., present for the Railroad Administration; and *H. A. Jaggard*, Superintendent of Elmira Division of The Pennsylvania Railroad Company.

BAEHITE, Commissioner:

This is an application by a large number of shippers and receivers of freight and express at the Himrod, N. Y., station of The Pennsylvania Railroad Company, for an order preventing that company from closing the freight and express station at the point named. The only answer made by the railroad company is that pursuant to his proclamation of December 26, 1917, possession and control of the railroads of the country have been taken by the President of the United States, and that since the date of said proclamation the

operation of the railroads of the country has been conducted by the Director General of Railroads, appointed in and by the proclamation of the President, and that consequently the company can not satisfy the demand even if the proposed discontinuance of the station in question subjects the complainants to undue hardship or disadvantage.

The answer of the company makes it incumbent upon the Commission to ascertain at the outset whether it can control the matter in dispute, or whether the complainants must seek relief at the hands of the general government.

There is no necessity for an examination of the question whether the President derives his power over the railroads from the fact that by the Constitution he is made Commander in Chief of the Army and Navy of the United States, and of the militia of the several States when called into actual service of the United States, or whether he does or can derive such power from Congress except "To regulate commerce with foreign nations, and among the several States, and with the Indian tribes," because the proclamation of the President in which he delegates his authority to a Director General of Railroads, and the acts of that Director General, show conclusively that they deem themselves to be acting by virtue of authority derived from acts of Congress. No opinion will be given upon this question. The act of August 29, 1916, which is a part of the army appropriation bill, provides as follows:

The President in time of war is empowered, through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same for the transfer or transportation of troops, war material, and equipment, or for such other purposes connected with the emergency as may be needful or desirable.

In pursuance of the above statute and subsequent declaration of war by Congress, the President issued his proclamation. In this proclamation we find the following:

Until and except so far as said Director General shall from time to time otherwise by general or special orders determine, such systems of

SHIPPIERS, HIMROD, v. PENNSYLVANIA R. R. Co. 341

Vol. VII.

transportation shall remain subject to all existing statutes of the United States and orders of the Interstate Commerce Commission, and to all statutes and orders of regulating commissions of the various States in which said systems or any part thereof may be situated. But any orders, general or special, hereafter made by said Director General, shall have paramount authority and be obeyed as such.

On March 21, 1918, another act passed by Congress became a law. Section 15 of this act provides —

That nothing in this act shall be construed to amend, repeal, impair, or affect the existing laws or powers of the States in relation to taxation, or the lawful police regulations of the several States, except wherein such laws, powers, or regulations may affect the transportation of troops, war materials, government supplies, or the issue of stocks and bonds.

The attention of this Commission has not been called to any general or special order of the Director General of Railroads which can be construed as taking from it jurisdiction over the subject matter of the complaint in this proceeding.

The question then arises, does the contemplated action of the Pennsylvania Railroad come under the jurisdiction of the police power of the State, because the term "lawful police regulations" as used in the act of 1918 refers to "police powers" as that term is generally used. It has been and must be so construed.

Himrod is a station on the Elmira division of The Pennsylvania Railroad Company. It is situated in the midst of a rich farming country, with about six hundred people living within a radius of a mile. The station has been in existence for about seventy years. For the year ended August 31, 1918, there was received at and forwarded from the station 3769 tons of freight in carload lots, bringing in a revenue of \$8062.11; there was also 387 tons of freight in less than carload lots, making a revenue of \$1492.38, or a total freight revenue of \$9554.49. The passenger revenue amounted to \$3433.15 for the same time; whether the last amount includes the revenue from passengers arriving at

the station does not appear. If the contemplated action of the company is had, passengers must pay their fares upon the trains. Those who ship or receive freight in less than carload lots must be at the station at the proper time or their goods will be without protection. Those who ship in carload lots, if they are not at all times present during the period of loading, must leave their wares unprotected. If shippers wish to procure their shipping bills they must drive to Starkey, four miles, over a not too good country road. The railroad will save the wages of its agent, \$95.88 per month, but the railroad expects to have some one to keep the station lighted, cleaned, and heated, so that the public may have a place in which to wait for trains. The total saving is estimated to be about \$40 per month.

The above facts certainly state a case in which the convenience and the comfort of the patrons of the road will be seriously disturbed if the contemplated action is allowed, and will represent but a small saving to the carrier, and can be controlled by the police power of the State acting through this Commission: section 54 of the Railroad Law.

That the facts of this case come under the control of the police powers of the State, and that action by the State does not interfere with the interstate clause of the United States Constitution, as indirectly intimated by counsel for the railroad, is abundantly established by authority.

In *Hennington v. Georgia*, 163 U. S. 299, the facts were that the State of Georgia passed a law forbidding the running of any freight train on any railroad of the State on Sunday, and provided a penalty for disobedience. The superintendent of a railroad was arrested and tried for a violation of the law. His defense was that the train which had run through Georgia on Sunday was engaged in interstate commerce carrying freight from Chattanooga, Tennessee, through Georgia and Alabama, to Meridian, Mississippi, and that applied to these facts the statute was repugnant to the Constitution of the United States. The

SHIPERS, HIMROD, v. PENNSYLVANIA R. R. Co. 343
Vol. VII.

Supreme Court of the United States said "No," and after citing many cases used these words:

We are of opinion that such a law, although in a limited degree affecting interstate commerce, is not for that reason a needless intrusion upon the domain of federal jurisdiction, nor strictly a regulation of interstate commerce, but, considered in its own nature, is an ordinary police regulation designed to secure the well-being and to promote the general welfare of the people within the State by which it was established, and, therefore, not invalid by force alone of the Constitution of the United States.

In the case of *Lake Shore & Michigan Southern Railway Company v. Ohio*, 173 U. S. 285, the Supreme Court discussed the effect and force of an Ohio statute which provided that each railroad company should cause three, each way, of its trains, if so many were run daily, to stop at any city or village containing over three thousand inhabitants, for a time sufficient to receive and let off passengers. The statute was violated by the railroad named in the title above, and a judgment based upon a penalty provided by the statute was secured against the company. Counsel for the railroad contended that the police powers of the State, when exerted with reference to matters more or less connected with interstate commerce, are restricted in their exercise, so far as the National Constitution is concerned, to regulations pertaining to the health, morals, or safety of the public, and do not embrace regulations designed merely to promote the public convenience. In answer to this claim the court says, page 292 —

This is an erroneous view of the adjudications of this court. . . . There are however numerous decisions by this court to the effect that the States may legislate simply with reference to the public convenience, subject of course to the condition that such legislation be not inconsistent with the National Constitution nor with any act of Congress passed in pursuance of that instrument, nor in derogation of any right granted or secured by it.

The court, in holding the Ohio statute to be constitutional, says, page 300 —

344 PUBLIC SERVICE COMMISSION, SECOND DISTRICT

P.S.C. 2d D.

The power of the State by appropriate legislation to provide for the public convenience stands upon the same ground precisely as its power by appropriate legislation to protect the public health, the public morals, or the public safety.

In no way does the relief demanded from this Commission by the complainants contravene any statute of the United States, and such relief can not interfere with the Government in its conduct of the war. The small amount to be saved by the railroad if its proposed action is allowed is no offset to the serious inconvenience which will result to the public.

The prayer of the complainants should be granted.

All concur.

Petition of RAQUETTE LAKE RAILWAY COMPANY under section 85, Railroad Law, for permission to cease operation of its railway during the winter season. [Case No. 6596.]

An application to cease winter operation of a railroad is not an application to abandon but rather to continue operation in a modified manner, and therefore the decisions regarding the right to abandon do not apply.

Such an application should be made early enough to give reasonable notice to those interested in all-the-year-round operation, particularly where the railroad has been theretofore operated during the whole year.

Decided December 5, 1918.

Appearances:

John K. Graves, Grand Central Terminal, New York city, and *Visscher, Whalen & Austin* (by Mr. Austin) for the applicant.

Frank L. Bell, Glens Falls, for the International Paper Company.

Theodore L. Cross, Utica, N. Y., for residents of Inlet, Raquette Lake, and surrounding country, and for the Eagle Nest Country Club.

George N. Ostrander, Albany, N. Y., for Patrick Moynihan and D. B. Moynihan.

Robert F. Livingston, Little Falls, for Mr. Bryers.

FENNELL, Commissioner:

This petition was filed September 30, 1918. Hearings were held on October 8th and October 30th, and briefs were thereafter filed.

The petition of the Raquette Lake Railway Company asks that it be permitted to cease operation of its railroad from

November 1, 1918, to May 31, 1919, inclusive, and thereafter in each year during the same months. The railroad line extends from Carter (formerly Clearwater, Herkimer county) to Raquette Lake, Hamilton county, a distance of approximately 18.13 miles.

The New York Central Railroad Company owns the stock of the Raquette Lake Railway Company and also operates the Raquette Lake Railway under an agreement terminable on sixty days' notice.

The Raquette Lake Railway was taken over December 27, 1917, by the National Director of Railroads, and was relinquished by him June 29, 1918. While the railroad was operated by the National Director the railroad wage increase occurred. On June 25, 1918, rates on this railroad were increased about 25 per cent.

The New York Central Railroad Company operated the Raquette Lake Railway as a feeder. The passenger rate on the Raquette Lake Railway was 5 cents per mile, but The New York Central Railroad Company allowed it an additional 5 cents per mile on through tickets. This practice was discontinued by the National Director July 1, 1918.

Regarding the National Director as acting within the scope of his authority in relinquishing the control and operation of the Raquette Lake Railway, and conceding the Raquette Lake Railway will make a substantial loss for its yearly operation, should we, to save a portion of the loss, permit a winter suspension?

The first question raised is as to whether or not the Raquette Lake Railway operates a railroad which comes within the purview of section 85 of the Railroad Law. That section provides as follows:

Certain railroads may cease operation in winter.—The directors of any railroad corporation operating a railroad constructed and used principally for transporting lumber or ores, during the summer months, or for summer travel, may, by a resolution duly passed at a meeting thereof, apply to the public service commission for permission to cease the operation of their road during the winter season, for a period not

Vol. VII.

exceeding seven months in any one year, specifying the date of such suspension, and the date of the reopening thereof; and such commission may, in its discretion, make an order granting the application wholly or in part, and thereupon such railroad corporation shall be relieved of the duty of operating its road during the period specified in the order. A copy of such order shall be posted in all depots and at the termini of such railroad, and published in every newspaper in each town in any part of which such road shall be constructed at least four weeks prior to the date of such suspension.

The language of the section describes the kind of railroad that may cease operation as being one "constructed and used principally for transporting lumber or ores, . . . or for summer travel." It may be that when the section was originally enacted the summer transportation of freight consisted largely of lumber and ores, and the passenger traffic was largely summer travel. The character of the freight hauled is not very material within the real meaning of the section. The question is, when is it hauled? The real business of this railroad is in fact a summer business. This being so, the question directs itself to the discretion of the Commission. If the railroad can afford to carry a summer traffic but will make a large annual loss if it is compelled to operate the year 'round, there will eventually develop a situation, because of this continuous loss, that will require the giving up of the railway operation entirely, both summer and winter. Unless the whole-year-round operation can be made reasonably remunerative, then it ought to be so limited in its winter operation that the summer service may be maintained. Continuous unprofitable operation of railroads can not be required, nor would it be desirable that such operation should be required. An administrative order of a regulating Commission can not alter an economic law. Unless railroads are reasonably remunerative they must, sooner or later, stop operating.

We think that the operation of this railroad comes within the purview of section 85, but the decision herein will cover only the winter of 1918-1919 as there are exceptional fea-

tures with respect to its operation during this coming winter, and also because it has been the practice of the Commission to grant suspension for one winter only, requiring the company to make a new petition for the next winter.

Counsel for petitioner contends that a railway company has a legal right to refuse to operate a non-paying railroad, and cites authorities to support his contention.

It is true that a railway company may refuse to operate, in the absence of a franchise clause compelling operation, a railroad that is losing money. Counsel's conclusion, though sound, has no bearing on the point at issue here. This is not an application to cease operation and abandon, but rather an application to continue to operate but in a modified manner. This question addresses itself not to the right to cease operation but to the right to modify its method of operation. That right rests in the discretion of the Public Service Commission.

The question has been raised as to the losses claimed by petitioner, it being asserted that many large items properly chargeable to investment have been charged to operation. It is not necessary to the disposition of the instant case to discuss the proper placing of the items so charged. These questions may be determined in the rate case hereinafter mentioned.

Some rather unusual conditions appear with respect to the proposed closing during the winter of 1918-1919 which make it necessary to take into consideration matters which ordinarily might not be present in a case of this character.

Pulp wood contractors have contracted to deliver f. o. b. cars on this line large quantities of pulp wood during the winter of 1918-1919. One concern alone has a contract for about 4500 cords of pulp wood at \$15.75 per cord which must come out over this railroad. This wood should be hauled this winter and can not be so hauled unless this road operates. The Pulp and Paper Company to which this wood is contracted has written as follows:

Vol. VII.

October 31, 1918.

Public Service Commission for the Second District, Albany, N. Y.:

GENTLEMEN: In the matter of the petition for closing during the winter of the Raquette Lake Railway, we beg to state that we have a contract for several thousand cords of pulp wood, made with Kreuzer and Tiffany, of Inlet, and it is of the greatest importance that this wood be shipped to us during the coming winter. We have depended upon this supply coming to us in order to keep our plant in operation and we trust you will see to it that this road is kept open so that K. & T. can make the deliveries which they have agreed to do.

Yours truly,

Oswego Falls Pulp & Paper Company,

H. L. PADDOCK, President.

Another pulp wood contractor is under contract to deliver 3500 cords of pulp wood "during the season of 1918-1919". Practically all of this pulp wood has been cut, peeled and piled ready for hauling to the railroad when the snow fall is heavy enough to make hauling possible. This wood is worth about \$18 a cord, peeled, and must be brought out over this railroad this winter. Smaller contractors who have to use this railroad must meet the same conditions.

There are several hundred people who have their all-the-year-round homes at different points on this railroad.

From the above it will be seen that there must be a loss to the railroad company if it operates this winter, and there must be loss to others if it does not operate. In view of the facts that the road in the past has continued operations during the winter, that it was taken under federal control December 27, 1917, was relinquished June 29, 1918, and that this proceeding was commenced by the filing of a petition September 30, 1918, the hearings finished October 30, 1918, and the questions submitted by briefs after that date, it would seem that the railroad company not having given an earlier notice of its intention should not now be permitted to transfer its operating losses to pulp wood contractors and others who have made substantial contracts and business arrangements relying on continuation of a status which has so long obtained. We think the road should not

cease operation during the winter of 1918-1919, but we also hold that if the petitioning company sees fit to make an application early in 1919 to cease operation in the winter of 1919-1920 that this decision shall have no influence on the disposal of that application.

Counsel for petitioner relies on the case of *Southern Pacific Company v. Interstate Commerce Commission*, 219 U. S. 433. In that case a carrier having established low rates, and shippers having made contracts based upon those rates, the shippers claimed the carrier was estopped from raising its rates inasmuch as the raise in rates would do injury to the shippers who had made contracts relying upon such rates, and that the raise would do further injury to them in that they could not compete with other territories under such higher rates. The increase in rates was sustained.

Shippers are presumed to know that rates to be adequate must change to meet changing conditions. When they make contracts, in advance, for deliveries based upon any given rate, they do so at their own risk. But this rule can hardly be authority for the proposition that a railroad will cease operation altogether for a period of eight months. Such a stoppage of operation by a railroad that has conducted winter operations in the past is certainly not such a condition as shippers and pulp wood contractors should take into account when making their contracts. If it was customary for this road to cease operations during the winter months, the rule would be different.

In addition to the pulp wood contractors, there is the public convenience and necessity as represented in the freight and passenger demands of the hundreds of residents who live at different points along this railroad. Public necessity and convenience must be taken into consideration, but the railroad should not be ordered to meet such requirements without reasonable compensation. The suggestion was made on the hearing that the pulp wood rates, freight

Vol. VII.

rates and passenger rates be adjusted upward to help meet the losses for the winter of 1919-1920. The petitioner insisted that no rates could be made in excess of the ones now established; that the federal authorities would not file any such rates as parts of through rates, and, therefore, they would not be effective legal rates and would not be collectible.

The National Director having relinquished the Raquette Lake Railway, and its request to cease winter operations being denied by this Commission, it must be a clear proposition of law, as well as a sound governmental proposition, that if this Commission has the power to refuse a request for winter suspension of operation, which amounts to an order for winter operation, it certainly has the power and the duty to fix rates consonant with such winter operation. Otherwise, we have the power to compel a method of railroad operation suitable for the public convenience and necessity and still have not the power to preserve and continue railroad operation itself by proper rates. The owners of the railroad are also a part of the public and their rights are entitled to the same consideration as the rights of those of the more numerous public that pays rates.

The Commission, on its own initiative, in view of requiring winter operation, will give a hearing to take evidence and fix emergency rates on the Raquette Lake railroad for the winter of 1918-1919.

Chairman Hill and Commissioners Irvine and Cheney concur; Commissioner Barhite not present.

352 PUBLIC SERVICE COMMISSION, SECOND DISTRICT

P.S.C. 2d D.

In the Matter of the Petition of DUNKIRK STREET RAILWAY, leased to Buffalo and Lake Erie Traction Company and operated by the Receiver of the traction company, under section 184 of the Railroad Law for approval of a declaration of abandonment of portions of the constructed route of said railway in the city of Dunkirk. [Case No. 6149.]

Permission to abandon a part of a street car line within the limits of a city, and thereby prevent the citizens from receiving the benefit of service, should not be permitted without protecting the interests of the city in every possible way.

Decided December 10, 1918.

Appearances:

Messrs. Kenefick, Cooke, Mitchell and Bass for the Dunkirk Street Railway Company.

Messrs. Thomas J. Cummings and G. W. Woodin for Merchants Exchange of Dunkirk, Dunkirk Real Estate Exchange, and others.

Lyman A. Kilburn, Esq., for the City of Dunkirk.

BARHITE, Commissioner:

This is an application by the temporary receiver of the Buffalo and Lake Erie Traction Company for the approval of a declaration of abandonment of a portion of the tracks, franchises, and operation of the cars of the Dunkirk Street Railway Company. The receiver has control of the Dunkirk Street Railway Company by reason of the fact that as receiver he owns and has possession of all of the stock of the company.

The receiver in this case is a temporary receiver appointed in a foreclosure action, and there is some question whether as a matter of law he can or should be permitted to abandon any of the property which comes into his hands. (*Paige vs. Schenectady Railway Co.*, 178 N. Y. 102, and cases therein cited.) It is not the province of this Commission

Vol. VII.

to pass upon that point, and it will be left for the determination of the Supreme Court, of which court the receiver is an officer, upon an application made to it upon notice.

In the opinion of the Commission the receiver should be permitted to abandon the operation of the road. An appraisal of the property used for city service by an expert of the Commission shows the value to be \$148,367. This property shows an income from operation of only \$5708.20, and a deficit according to the last figures furnished of \$15,768.60 per year. Certainly the receiver should not be compelled to bear this expense. It is a serious matter for a city to be without street car service, and the Commission hesitates to take its contemplated action without in every possible way guarding the interests of the municipality. This proceeding has been held for a long period of time in the hopes that the city might find some one willing to take the line from the receiver, who has offered to dispose of the road at practically a nominal figure, but nothing has been accomplished. Even now the receiver should not be permitted to destroy the property without a further opportunity to procure a company or individual willing to assume the burden of running the road.

The road is also indebted to the city in a considerable amount for taxes and assessments. Some provision should be made whereby the city can be assured that it will receive its money, and the receiver has promised to take such action.

Chairman Hill and Commissioners Irvine and Cheney concur; Commissioner Fennell not present.

In the Matter of the Complaint of the VILLAGE OF MIDDLEPORT, Niagara county (by its President), HARRIET DE LANO JUDSON, FRANK M. SMITH, THEODORE J. DOSCH, ALBERT E. SMITH, and CHARLES H. HAYNER against THE NEW YORK CENTRAL RAILROAD COMPANY as to a culvert in said village under said railroad. [Case No. 6536.]

Upon a complaint made by owners of lands adjacent to an embankment of a railroad, alleging that a culvert in such embankment which was constructed to take care of the flow of a natural watercourse has by reason of changed conditions in the watershed of the stream become inadequate to carry off the flow, and asking for the enforcement by the Commission of the claimed duty of the railroad to enlarge the culvert,

It is Held, That the Commission has no jurisdiction, the public interest, so far as concerns the facilities of the railroad for rendering service, not being involved.

Decided December 10, 1918.

Appearances:

George D. Judson, Middleport, N. Y., for complainants.

Maurice C. Spratt, Buffalo, N. Y., for respondent.

HILL, Chairman:

The complainant Village of Middleport is a municipal corporation; the other complainants are owners of property in said village. The complaint prays that the respondent be required to widen a certain stone culvert which passes under its tracks where they run on an embankment through the village of Middleport. The culvert in question was constructed about fifty years ago, is about eleven feet in width, and carries the waters of an unnavigable stream known as Middleport creek through the embankment and under the tracks. The railroad company claims that the proposed

enlargement would cost from thirty to forty thousand dollars.

It appears that up to nine or ten years ago the culvert fully served its purpose, but that about that time the waters became, and have since continued to be, troublesome by clogging the culvert with water and ice two or three times each season during periods of flood, resulting in a serious backing of water which floods and injures the lands and buildings above the culvert and also to some extent certain of the village streets. It also appears clearly that the reason for the change in the action of the waters of the stream is that the watershed above the railroad has since the construction of the culvert undergone agricultural development by the cutting off of timber and the drainage of swamps: this has resulted in the water flowing from such improved lands into the bed of the creek with much greater precipitancy than was the case while the lands remained in their original state of nature.

The duty of the railroad to restore any stream or water-course intersected by its route "to its former state, or to such state as not to have unnecessarily impaired its usefulness," is found in section 21 of the Railroad Law. The company claims that this duty once fairly performed the statute becomes satisfied and it is immune from the duty of making any alterations which changed conditions show to be necessary. The complainants, on the other hand, insist that the duty imposed by the statute is a continuing one, and that there natural or artificial changes of the conditions existing at the time of the original construction supervene, the railroad company can be required, by virtue of the statutory provision referred to, to make such alterations as may be necessary to adapt the culvert to the changed conditions.

This position of the complainants seems to be abundantly supported by authority. *People v. N. Y. C. R. R. Co.*, 168 N. Y. 187; *Hatch v. S., B. & N. Y. R. R.*, 506 Hun 64;

Cott v. Lewiston R. R. Co., 36 N. Y. 214; Mundy v. N. Y., L. E. & W. R. R., 75 Hun 479.

Among other defenses the railroad company sets up the claim that the Commission has no jurisdiction of the subject matter, and in view of the disposition we feel impelled to make of that contention, none other of the defenses will require examination.

Section 45 of the Public Service Commissions Law, specifying the general powers of the Commissions, gives them general supervision of all common carriers, "with power to examine the same and to keep informed as to their general condition and the manner in which their lines are managed, not only with respect to the adequacy, security and accommodation afforded by their service, but also with respect to their compliance with all provisions of law, orders of the commissions and charter requirements". Section 49, subdivision 2, requires that "whenever the commission shall be of opinion . . . that the regulations, practices, equipment, appliances or service of any such . . . railroad corporation in respect to transportation of persons, freight or property within the state are unjust, unreasonable, unsafe, improper or inadequate, the commission shall determine the just, reasonable, safe, adequate and proper regulations, practices, equipment, appliances and service thereafter to be in force, to be observed and to be used in such transportation of persons, freight and property," etc. Section 50 provides that "if in the judgment of the commission . . . repairs or improvements to or changes in any tracks, switches, terminals or terminal facilities, motive power or any other property or device used by any . . . railroad corporation . . . in or in connection with the transportation of passengers, freight or property ought reasonably to be made, or that any additions should reasonably be made thereto in order to promote the security or convenience of the public or employees or in order to secure adequate service or facilities for the transportation of passengers, freight or

property, the commission shall . . . make and serve an order directing such repairs, improvements, charges or additions to be made," etc.

These provisions of the statutes were quite fully considered in *People v. Willcox*, 200 N. Y. 423, and the sections of the Public Service Commissions Law above quoted were there held to apply, so far as concerns the question here raised, to the regulation of the construction, maintenance, equipment, terminal facilities, and operations of railroads in such respects only as affect the transportation of persons and property. The object of the legislation is there deduced to be the regulation of the management and of the operations of common carriers in the interest of the public; and while it is claimed that that case was decided on other grounds, the question which is here raised was before the court there, and we feel that we must regard it as authority.

The same question has been considered by the Commission before in the case of *Truck Gardeners v. Erie R. R. Co.*, VI P. S. C. N. Y. 2nd Dist. 13, where the Commission dismissed the complaint for want of jurisdiction; and in a much earlier case (1902), which is referred to in the memorandum in the *Truck Gardeners* case, the then Board of Railroad Commissioners, whose powers were conferred by statutory provisions very similar in their scope and intent to those now defining the powers of the Commission, arrived at a similar conclusion.

While it may be claimed that the flooding of certain portions of village streets involves a public interest, it is not an interest which is related to the public functions of the railroad as concerns the transportation of persons, freight, or property, and is therefore not a fact which distinguishes the case for the purposes of this determination. The Commission has also refused relief on jurisdictional grounds where the obligation of the railroad to prevent flooding was contractual in its nature, *Harbeck v. P. R. R. et al.*, V P. S. C. N. Y. 2nd Dist. 213; and while that determination is

358 PUBLIC SERVICE COMMISSION, SECOND DISTRICT

P.S.C. 2d E.

not strictly in point, it serves to emphasize the view that the jurisdiction of the Commission in cases of this character is limited to the redress of grievances which relate directly to the public interest.

It seems clear that any rights which the plaintiffs possess against the railroad company are of a private character which must be prosecuted in the courts, and that the complaint must be dismissed.

Commissioners Irvine, Barbite, and Cheney concur; Commissioner Fennell not present.

In the Matter of the Complaint of F. R. MALONEY of Chase Mills, St. Lawrence county, *against* NORWOOD AND ST. LAWRENCE RAILROAD COMPANY as to increased freight rates.

Also Complaint of the Company, in its answer, asking that the rates be sustained. [Case No. 6618.]

Purely intrastate rates put into effect by a railroad while under federal control by filing with the Interstate Commerce Commission only, pursuant to General Order No. 28 of the United States Railroad Administration, are not legal in New York after the road is returned to private control without complying with New York statutes regulating the initiation and change of rates of common carriers.

Decided December 12, 1918.

Appearances:

George H. Bowers, Canton, N. Y., for the complainant.
W. J. Fletcher, Norwood, N. Y., for the Norwood and St. Lawrence Railroad Company.

CHENEY, Commissioner:

The Norwood and St. Lawrence Railroad Company is a steam railroad operating from Norwood to Waddington, in St. Lawrence county, wholly in New York state. As its operations are all intrastate it is under the jurisdiction of this Commission.

The proclamation of the President of the United States, issued December 26, 1917, whereby he took control of "each and every system of transportation and the appurtenances thereof located wholly or in part within the boundaries of the continental United States, and consisting of railroads and owned or controlled systems of coastwise and inland transportation engaged in general transportation, whether operated by steam or electric power," is broad enough to include this railroad, and it is fair to assume that this railroad was taken over by the United States Government at

that time, although no contract was ever made with the railroad company for compensation as provided by that proclamation.

Notwithstanding that the road was under government control, a local freight tariff of class rates applying between the different stations on the road, all intrastate rates, was filed with this Commission by the operating officials of this road on May 10, 1918, effective June 10, 1918, known as "P. S. C., 2 N. Y., No. 45," canceling "P. S. C., 2 N. Y., No. 33". In this tariff the rates between Norwood and Norfolk, Norwood and Raymondville, Norfolk and Raymondville, Raymondville and Chase Mills, and Chase Mills and Waddington, were fixed at 4.5 cents per one hundred pounds for fourth class and 2.5 cents for fifth class.

Inasmuch as in the President's proclamation it was provided "until and except so far as said director shall from time to time otherwise by general or special orders determine, such systems of transportation shall remain subject . . . to all statutes and orders of regulating commissions of the various states," and the action taken conformed with the statutes of the State of New York and the regulations of this Commission thereunder, that action fixed lawful rates of freight charges, whether the road was under private control or government control.

Subsequently, on May 25, 1918, the Director General of Railroads issued General Order No. 28, whereby all rates on government controlled roads were increased by filing schedules with the Interstate Commerce Commission, effective June 25th, on not less than one day's notice. In obedience to this order, this road filed with the Interstate Commerce Commission what it termed "Special Supplement No. 1 to Local Class Rate Tariff," marked "Special Supplement No. 1 to I. C. C. No. 40". This tariff bore the following notation: "The rates made effective by this schedule are initiated by the President of the United States through the Director General, United States Railroad Administration, and apply to both interstate and intrastate

traffic. This schedule is published and filed on one day's notice with the Interstate Commerce Commission under General Order No. 28 of the Director General, United States Railroad Administration, dated May 25, 1918, and amended June 12, 1918." By this new tariff the rates between the stations named were raised, for fourth class to 12½ cents per 100 pounds and for fifth class to 9 cents, or about 200 per cent for fourth class and 300 per cent for fifth class. No copy of this tariff schedule was ever filed in the office of this Commission, even for our information, as all railroads operating under federal control were advised by the authorities to do.

Some time after this was done this railroad was released from federal control, in pursuance of that portion of the President's proclamation which reads as follows: "By subsequent order and proclamation, possession, control, and operation in whole or in part may also be relinquished to the owners thereof of any part of the railroad systems or rail and water systems, possession and control of which are hereby assumed"; and the road has since that release been operated by the owners thereof.

Notwithstanding the release, no tariff schedule containing the rates prescribed by the "Special Supplement No. 1," or any other rates, was filed with this Commission, but the company continued to charge and collect the rates contained therein.

Complaint was made against these rates, which was served on the company, and in its answer it justified under the Special Supplement No. 1, and stated that the "said tariff rates were initiated by the President of the United States, through the Director General, United States Railroad Administration, and have his sanction and approval". Upon the hearing the foregoing facts were developed on the admission of the railroad company.

As this road is not now under federal control, but is a common carrier wholly within the State of New York, it is subject to the laws of the State of New York and under

the jurisdiction of this Commission, and no question of the power of the President of the United States or the Director General of Railroads to initiate or continue purely intrastate rates is involved in this case.

Section 28 of the Public Service Commissions Law prescribes, "Every common carrier shall file with the Commission having jurisdiction and shall print and keep open to public inspection schedules showing the rates, fares and charges for the transportation of passengers and property within the state between each point upon its route and all other points thereon".

Section 29 prescribes, "Unless the Commission otherwise orders no change shall be made in any rate, fare or charge, or joint rate, fare or charge, which shall have been filed and published by a common carrier in compliance with the requirements of this chapter, except after thirty days' notice to the commission and publication for thirty days as required by section twenty-eight of this chapter, which shall plainly state the changes proposed to be made in the schedule then in force, and the time when the changed rate, fare or charge will go into effect; and all proposed changes shall be shown by printing, filing and publishing new schedules or shall be plainly indicated upon the schedules in force at the time and kept open for public inspection". Then follows a provision permitting the Commission to allow changes upon short notice.

Section 33 prescribes, "No common carrier subject to the provision of this chapter shall after the first day of November, nineteen hundred and seven, engage or participate in the transportation of passengers or property, between points within the state, until its schedules of rates, fares and charges shall have been filed and published in accordance with the provisions of this chapter. No common carrier shall charge, demand, collect or receive a greater or less or different compensation for transportation of passengers or property, or for any service in connection therewith, than the rates, fares and charges applicable to such

transportation as specified in its schedules filed and in effect at the time."

Those sections state in plain and unambiguous language the different acts which must be performed by common carriers in this State to initiate and change rates, and makes unlawful any other rates than those so established. Rates can not be legally established in any other way.

The rates prescribed by this company in its tariff schedule known as "P. S. C., 2 N. Y., No. 45," filed May 10, 1918, effective June 10, 1918, were legally established under our law, and have not been legally changed while the road has been under private control. No rates other than those therein contained have been legally established since the road was returned to private control, and no others can be legally charged or collected.

The complaint should be sustained, and the company ordered to refrain from charging or collecting for local freight between the stations mentioned therein any rates other than those contained in its tariff schedule "P. S. C., 2 N. Y., No. 45," until the same shall be legally changed.

Chairman Hill and Commissioners Irvine and Barhite concur; Commissioner Fennell not present.

364 PUBLIC SERVICE COMMISSION, SECOND DISTRICT
P.S.C. 2d D.

Petition, or Complaint, of SOUTHERN NEW YORK POWER AND RAILWAY CORPORATION under subdivision 1, section 49, Public Service Commissions Law, for permission to increase passenger fares except in the city of Oneonta.
[Case No. 6601.]

Decided December 31, 1918.

Appearance:

N. P. Willis, Cooperstown, N. Y., for petitioner.

CHENEY, Commissioner:

The Southern New York Power and Railway Corporation operates an electric railway from the village of Mohawk to the city of Oneonta, with a branch extending from Index to Cooperstown, and a local system of street railroad in Oneonta. The road is operated in two divisions: the interurban, about 58 miles long; and the urban in the city; the total length of track and sidings being about 68 miles. The present company was formed in 1915, upon the reorganization after a mortgage foreclosure of the old Otsego and Herkimer Railroad Company.

The road does a general passenger and freight business, and for the purpose of producing power operates an electric power plant which at present generates a surplus of power over that needed for railway operation, which is sold, and the income therefrom is a material addition to the revenue of the corporation. About 60 per cent of this power is produced by water.

The road is now operated with a fare schedule of 3 cents per mile for passenger service, which is the maximum which it is permitted to charge by section 57 of the Railroad Law without the consent of this Commission. It has filed its petition, or complaint, stating that the maximum rates chargeable by it are insufficient to yield reasonable compensa-

Vol. VII.

tion for the services rendered, and are unjust and unreasonable, and has asked that its rates for passenger service be fixed at 4 cents per mile for ticket fares, and $3\frac{1}{2}$ cents per mile for mileage books. That presents to the Commission the whole question of the rates to be charged, and it has power to determine the "just and reasonable rates, fares and charges to be thereafter observed and in force as the maximum," notwithstanding the provisions of the statute fixing fares. (Railroad Law sec. 57; Pub. Serv. Com. Law sec. 49; *People ex rel. Ulster & Delaware R. R. Co. v. Pub. Serv. Com.*, 171 App. Div. 607, affd. 218 N. Y. 643.)

The pending application does not affect the present 5 cent fare being charged for the city operation in the city of Oneonta; and from the proof presented at the hearing it appears that the company does not operate more than one mile of track in any of the incorporated villages through which it passes. The relief asked for does not therefore contravene section 181 of the Railroad Law fixing the 5 cent fare in cities and incorporated villages.

Appended hereto is an income statement, taken from the books of the company for the calendar years 1916 and 1917, and also for the twelve months ended August 31, 1917, and August 31, 1918. The statement for the year ended August 31, 1918, more nearly represents the results of present operations than any of the others, and can better be used as a forecast of future results. This statement shows that there remains of the total receipts of the company after paying operating expenses, taxes, and rent of track and equipment, the sum of \$66,457.02, out of which to pay fixed charges, to provide for depreciation and contingencies, and any return on capital invested. The company has outstanding \$952,000 of bonds, and unfunded interest bearing debt amounting to \$122,725. The annual interest payable upon this indebtedness amounts to between \$60,000 and \$65,000. On September 1st increases in the pay of the employees of the company became effective, which will increase the opera-

ting expenses by \$15,000 per annum, none of which increases are reflected in the figures given above. From this showing it appears probable that the company, provided the volume of its business and its rates remain the same, will be in receipt of hardly sufficient revenue to pay its operating expenses, taxes, and fixed charges.

One item on the balance sheet of this company requires some explanation, and that is the surplus account, amounting to about \$146,000. If that sum had been accumulated from undistributed earnings in the three years of the company's existence since the reorganization, it might well be required to undergo a lean period for awhile before receiving an advance in rates. An examination of the facts relating to this item shows that none of it has been accumulated from earnings. A portion of it was the book surplus taken over at the inception of the company following the reorganization, and a portion represents the profit over book figures realized from the sale of certain property and facilities not needed for present use, at the present high junk prices. Owing to the scarcity of funds, the bondholders have waived a large amount of the interest due them, and the amount thus payable has been carried to the surplus account. The reports show that the company has not since the reorganization earned sufficient to pay its operating expenses and fixed charges, the bondholders have not received all the interest which was their due but have waived the same, and no dividends have been paid on any of the stock of the company.

In this connection it should be noted that the figures given above do not make any provisions whatever for a depreciation reserve. This company has not in the past nor is it now carrying any sum from its income to a reserve account for the purpose of replacing property worn out in the service. That is a very bad policy and can only result in ultimate disaster, for the track and equipment do wear out; and when they wear out must be replaced if the company is to continue to give service, and the replacement can not be paid for by

new capital issues. In the judgment of the Commission, there should be placed in the account reserve for depreciation at least the sum of \$30,000 annually, and if this is done it will decrease the sum applicable to the payment of interest and return on capital by the same amount.

The capital accounts of this company were the subject of a rigid scrutiny by this Commission at the time of the approval of the reorganization of the company, which resulted in the order of April 20, 1916, and at that time a careful inventory and appraisal of the property of the company was made by the employees of the Commission. The value of the fixed capital of the company at that time was fixed at \$1,840,589.08; there has been added since that date \$283,377.73, leaving the fixed capital as of August 31, 1918, \$2,123,966.81. It is therefore unnecessary to enter upon any separate valuation of this property for the purpose of this proceeding, and we are justified in treating that amount as the base for fixing rates.

Upon that basis, there is indicated by the figures given above a rate of return, out of which must come all interest payments, of 3.67 per cent for 1916; 3.94 per cent for 1917; 4.45 per cent for the year ended August 17, 1917; and 3.13 per cent for the year ended August 31, 1918; and no court has ever held that a public service corporation should be compelled to give service for so meager a return.

It is not probable that increased revenue will result from increased passenger business. The road runs for the most part through a rather thinly populated farming section. There are no flourishing cities or villages along its line, and the termini of the road are comparatively small places. The population of the territory served is at a standstill, if not declining. The road is paralleled for the most part by improved highways, and serious inroads upon the passenger traffic have been made by automobile and jitney bus competition. It is probable that the road is carrying at the present time all the passengers that the territory produces.

It does not seem feasible to realize additional revenue from the freight business of the line. While this road probably is now deriving a larger proportionate revenue from its freight business than any other electric road in the State, relief from this source is not apparent. The road is now carrying practically all the freight for the different communities which it serves, but owing to the fact that there are practically no manufactories along its lines, the freight business is limited, the principal income being derived by the carriage of milk from the farms. The freight rates have been increased within a comparatively short time and are now as high or higher than the rates charged by other roads for similar service.

If the request for increased passenger fares is granted, the maximum increase of revenue which could be derived therefrom would be 25 per cent of the present passenger revenue of \$171,205.14, or \$42,801.28, assuming that the same number of passengers are carried and that all pay the maximum fare. It is evident that this amount will not all be realized, as the experience of other companies has demonstrated that an increase in fare is almost invariably followed by a falling off in traffic. In this case also it appears that it is proposed to establish a mileage book rate at $3\frac{1}{2}$ cents per mile, and the evidence is that a large number of the passengers carried are regular riders. It is probable that a considerable portion of them will purchase mileage books, making an increase in revenue in all such cases of only $12\frac{1}{2}$ per cent instead of 25 per cent. We have, however, for the purposes of our calculation of probable future results, used the possible maximum of 25 per cent. Applying this increase of revenue and making allowance for the increased operating expense occasioned by the higher wages now being paid, and the setting aside of an adequate reserve for depreciation as recommended above, the gross income applicable to the payment of interest and return on capital will amount to \$65,238.30, which indicates a return of but 3.07 per cent

Vol. VII.

on the value of the property used in the service as fixed above.

We have hesitated before consenting to an increase of fare to 4 cents per mile, which is a higher rate than is charged for the carriage of passengers by any other road in the State, except a few short lines operating under peculiar conditions. The reason of the hesitation is that we doubt the efficacy of the remedy for the ills this corporation is suffering, and we fear that the loss of traffic will offset any benefit to be derived from the increase of fare. But the Court of Appeals has held, "The question what general policy should be adopted by the respondent in developing suburban trade was one to be decided by it and not by the State. The methods and rates which it should apply to the development of any policy were subject for regulation, but the question whether the welfare of the road would be best subserved by one policy or another was a subject to be decided by the officers and stockholders of the corporation." (*People v. Pub. Serv. Com.*, 215 N. Y. 241, 254.) In view of that decision, we are inclined to adopt the only method which appears to be available to enable this road to render service to the communities whose principal transportation facilities are afforded by it, and not assume to decide questions of policy in corporate management.

We therefore find that the rates and charges for passenger service now charged by the Southern New York Power and Railway Corporation are insufficient to yield reasonable compensation for the service rendered, and are unjust and unreasonable, and that the just and reasonable rates, fares, and charges for such service to be hereafter observed and in force by it as a maximum shall be at the rate of 4 cents per mile for tickets and cash fares, and 3½ cents per mile for mileage books.

All concur.

370 PUBLIC SERVICE COMMISSION, SECOND DISTRICT

P.S.C. 2d D.

INCOME STATEMENT

Item	1916	1917	Year ended August 31, 1917	Year ended August 31, 1918
Passenger revenue.....	\$168,225.01	\$174,701.40	\$174,077.68	\$171,205.14
Freight and milk revenue.....	66,273.06	77,337.41	69,866.68	98,175.26
Sale of power to subsidiary.....		35,231.55	30,848.25	38,811.00
Other operating revenue.....	17,897.27	19,199.77	18,806.06	19,192.73
Gross operating revenue.....	\$252,395.34	\$306,470.13	\$293,568.67	\$327,204.13
Operating expenses.....	162,646.87	201,598.54	183,362.87	234,971.03
Net operating revenue.....	\$89,748.47	\$104,871.59	\$110,235.80	\$92,233.10
Taxes.....	14,027.56	12,435.00	11,850.00	15,088.24
Income from operations.....	\$75,721.11	\$92,436.59	\$98,385.00	\$77,144.86
Non-operating income.....	10,138.13	315.32	3,849.69	1,069.53
Gross income.....	\$85,859.24	\$92,751.91	\$102,235.49	\$78,075.53
Rent of track and equipment.....	7,863.00	8,906.53	7,711.63	9,618.31
Gross income to provide for fixed charges, depreciation, and contingencies.....	\$77,996.24	\$83,845.38	\$94,523.86	\$66,457.02

Petition of AUBURN AND SYRACUSE ELECTRIC RAILROAD COMPANY under subdivision 1, section 49, Public Service Commissions Law, for permission to increase passenger fares. [Case No. 6074.]

Decided December 31, 1918.

Appearances:

Ernest I. Edgcomb, Syracuse, N. Y., for the petitioner.

Richard C. S. Drummond, Auburn, N. Y., and *Mark I. Koon*, Mayor, for the City of Auburn.

CHEENEY, Commissioner:

The Auburn and Syracuse Electric Railroad Company on June 25, 1917, presented a complaint under section 49 of the Public Service Commissions Law, alleging that the rates, fares, and charges chargeable by it were insufficient to yield a reasonable return upon the value of the property used in the service, and were unjust and unreasonable; and asked that the fare within the city of Auburn and the Auburn zone be fixed at 6 cents, and that the fare within the corporate limits of the city of Syracuse be also fixed at 6 cents.

Pending the determination of the case, the litigation was carried on which resulted in the decision of the Court of Appeals in the *Quinby* case (223 N. Y. 244). A hearing was had, following that decision, at which it appeared that certain of the local franchises or consents under which the road operated in the city of Auburn contained rate restrictions which seemed to bring the proceeding within the effect of the doctrine laid down in that case, and further proceedings were stayed in the rate case.

On December 10, 1918, the local authorities of the City of Auburn, the Common Council, with the approval of the Mayor, adopted a resolution waiving during the period of the war and until the general treaty of peace shall be signed

and become effective, and for a reasonable time thereafter, the provisions of all franchises or consents under which the road is being operated in the city of Auburn relating to rates of fare, and submitting to this Commission the matter of fixing the rate of fare to be charged, with a maximum of 6 cents.

The Commission has therefore entered upon the determination of the pending complaint, and held a hearing in the city of Auburn at which the Mayor and Corporation Counsel of the city attended, and at which time no one appeared in opposition to the proposed rates.

At the hearing, the question of the proposed increase of fare in the city of Syracuse was not considered; and the Commission will decide and fix the rates in the city of Auburn, and retain jurisdiction of this proceeding for the purpose of further consideration of the rates in the city of Syracuse should such action be desired in the future.

The Auburn and Syracuse Electric Railroad Company operates an interurban electric railroad from Syracuse to Auburn, and in addition a local service in the city of Auburn. Certain of the Auburn city lines extend a short distance outside of the city, but are operated as a part of the Auburn city zone for a unit fare of 5 cents.

Upon the hearing, statements taken from the books of the company were produced showing the results of the operation in the Auburn city zone as separated from the interurban operation for the fiscal years 1912 to 1917 inclusive, and for the eleven months of 1918 ended November 30th, and these statements, together with the reports of the company on file, have been checked and analyzed by the Commission's division of statistics and accounts. In the computation of earnings, the city operation is given credit not only for the actual receipts from the city cars, but also for 5 cents for each interurban passenger carried in or out of the city over the city lines. Credit is also given for a proportion of the freight revenue, and other items of general revenue, upon a basis which appears to be fair. The apportionment of

Vol. VII.

the expenses of operation between the city lines and the interurban line also seems to have been made upon a division which is eminently fair to the city operation; in fact, if any errors of judgment have been made in this apportionment, they have been such as tend to increase the apparent net revenue of the city lines.

These figures show that the receipts from operation of the cars in the Auburn city zone for the eleven months of 1918 fell short \$8668.95 of sufficient to pay the actual operating expenses. In addition, taxes amounting to \$10,709.61 were chargeable to the Auburn operation; and after giving credit for non-operating revenue and deducting the amount paid for trackage privileges and subway rental in Auburn, the final deficit for the eleven months' period amounted to \$21,204.72, without any regard to the share of the interest upon the funded and other debt of the company which the Auburn city road should bear, and leaving nothing for return on invested capital.

The bonded indebtedness of the company amounts to \$1,752,000 at 5 per cent interest, and in addition there are outstanding \$117,000 of short-term notes bearing interest at 6 per cent, the total annual interest being about \$94,000. Some very considerable proportion of this should be borne by the Auburn city operation. The capitalization of the company is preferred stock \$712,000, common stock \$1,250,000. It has never paid any dividends on its common stock, and has paid no dividends upon its preferred stock for four years.

An examination of the figures submitted for the period mentioned shows that while there has been some increase in gross receipts due to the gradual growth of the business, there has been a steady decline in the amount of the net income applicable to the payment of interest and other return on capital, and in the present year there was shown a large deficit as appears above. The reason for this condition appears conclusively to be the large increase in the cost of materials and labor, especially the latter. The year 1917 was the best year the company has had, so far as gross

receipts from the carriage of passengers was concerned, and from the showing made so far, the year 1918 bids fair to be as good; but notwithstanding this good showing, the great increase in the cost of materials and labor has more than offset the increase in receipts and has turned the surplus into a deficit.

In order to retain its men the company has been obliged to make a number of increases in wages, and recently the matter of the wages to be paid was submitted to the War Labor Board, which Board, on November 20, 1918, made an award again materially increasing wages, to be effective August 5, 1918. The increases contained in that award will increase the amount of wages to be paid upon the whole property by \$40,000. We have not been furnished with the exact figures of the increase for the Auburn city operation alone, but no doubt a large part of the \$40,000 increase will properly be chargeable there. None of this last increase in wages appears in the figures above considered.

The proposed increase in revenue to the company has been estimated, on the basis of a 10 to 12 per cent decrease in riding resulting from the increase in fare, which has been the assumption adopted by the Commission in similar cases, to amount to about \$17,000 for a year's business. That will not make up the deficit that already exists for eleven months' operation, without considering the increased operating expense resulting from the award of the War Labor Board, nor fixed charges, nor return on capital, nor other contingencies.

This company has not set up an adequate reserve for depreciation, but in view of the results already shown we have not taken into consideration at all any sum to provide for that. Whatever should be done, and careful business management requires that it should be done, would only increase the deficit.

We have not considered it necessary to go into any valuation of the property used in the service. If we should grant the increase asked for, which is the extent we can go under

Vol. VII.

the waiver of the franchise restrictions, the revenue of the company from the Auburn operation will not be sufficient to pay the operating expenses. The question of the rate of return does not enter into the case, for there will be no funds left for return on capital. It is therefore unnecessary to fix the value of the property upon which a return should be allowed.

An order should be entered fixing the rate of passenger fare to be charged in the Auburn zone at 6 cents, effective during the period mentioned in the waiver of the franchise rate restrictions.

All concur.

INDEX

Abandonment, Electric Railroad.

Permission to abandon a part of a street car line within the limits of a city should not be granted without protecting the interests of the city in every possible way. *Petition of Dunkirk Street Railway.* 352

Capitalization.

1. On conversion of an ancient hydraulic power installation into a modern hydro-electric plant, the equivalent of 16 per cent on the cash involved was under the circumstances allowed for risk and purchaser's efforts and outlay in consultation and supervision. *Petition of Cohoes Power and Light Corporation et al.* 255

2. Invested capital, for the purpose of computing rate of return to a public service corporation, means the actual value of the property used in giving the service. *Petition of New York State Railways.* 302

3. This has no connection with the share capital of the corporation, and it is not material whether the capital was raised by the issuance of bonds or the sale of stock. *Id.*

4. Interest on bonds and other borrowed money must come out of the amount applicable to return on invested capital. *Id.*

Certificate of Convenience and Necessity.

1. When a franchise includes a route from a central point in a city to the city line as part of a line extending over country roads, the consent of the city forbidding intracity traffic, the only question is whether the applicant should be permitted to bring traffic originating outside into the city, and conversely. The Commission will not use its power indirectly to regulate competition over or along rural highways. *Petition of Edson U. Gaiser.* 147

2. An established stage route lying partly inside and partly outside an incorporated city will be protected from the competition of a proposed parallel line so far as concerns that part of the route lying inside the city. *Petition of Flori Buschini.* 299

Competition.

1. The opposition of competing railroads will not be allowed to overbalance a public demand for better freight facilities. *Joint Petition of The Pennsylvania Railroad Company and The Delaware, Lackawanna and Western Railroad Company.* 106

2. An established stage route lying partly inside and partly outside an incorporated city, which is giving satisfactory service and caring adequately for the traffic offered, will be protected from the competition of a proposed parallel line so far as concerns that part of the route lying inside the city. *Petition of Flori Buschini.* 299

Crossing, Highway.

Circumstances not justifying a direction to the railroad company to erect gates. *Complaint of President of the Village of Fredonia v. The New York Central Railroad Company.* 14

Discrimination.

1. Proposed rates using the city line as a zone boundary may be discriminatory, where there has been a long established flat city rate applicable in a city and its outlying districts, suburban and interurban. *Complaint of Horseheads Transportation Association et al. v. Elmira Water, Light and Railroad Company.* 247

2. All the customers of a public service corporation of the same class are entitled to the same rates and the same treatment. A contract can not be made with one customer which gives a preference or an advantage over other customers. *Complaint of Customers v. Newfane Electric Company.* 269

3. The continuance of a rate for years, resulting in the location of patrons in particular places in reliance thereon, creates an equity which should not be lightly regarded, even though there is apparent discrimination. *Petition of Hudson Valley Railway Company.* 287

4. Any rate made by an electrical corporation permitting it at its option to discontinue service to one of a class while continuing it to another of the same class is unlawful. *Matter of Service Furnished by Central Hudson Gas and Electric Company.* 336

Fares, Electric Railroads.

1. Increase of fare within the village of Waverly. *Petition of Waverly, Sayre and Athens Traction Company.* 19

2. Increase of fare beyond the five cent rate permitted by section 181 of the Railroad Law, held necessary to earn a fair return on the value of the property used in the public service. *Petition of Ogdensburg Street Railway Company.* 135

3. A condition inserted in a statutory consent of an abutting owner as a consideration for the granting of such consent does not preclude an increase of fare by the Commission in excess of the maximum fixed by the condition. *Petition of Poughkeepsie and Wappingers Falls Railway Company.* 138

4. Extent to which intangible assets may be considered as a component part of the capitalization, in a rate proceeding, discussed. *Id.*

5. In determining that an increase should be permitted on the Geneva urban lines although the rate of return thereon is at present greater than on the interurban line, and in view of recent increases on the latter, the Commission should take into account the practical consideration of what the traffic will bear and so adjust rates that there may be an increase rather than a decrease in revenues. *Petition of Geneva, Seneca Falls and Auburn Railroad Company, Inc.* 160

6. Discontinuance of the sale of commutation tickets used only on certain cars during rush hours, sold for a number of years but requiring special service, the cost being less than the revenue, and a steam railroad carrying most of the commuters in the territory, approved. *Complaint of Residents of Binghamton, etc., v. Binghamton Railway Company.* 177

7. Increase in fares allowed, as probable income will not be such as to provide an undue return upon the capital invested, as computed in the absence of a valuation. *Petition of Fishkill Electric Railway Company.* 194

8. The Barnes Act, laws 1905, chapter 358, superseded rates previously fixed by franchise and contract, and the statutory rate may be superseded by the Commission under section 49, subdivision 1, Public Service Commissions Law. *Petition of United Traction Company, etc.* 207

9. The return need not necessarily be enough to pay dividends, or even to pay interest. The fact that there are underlying bonds greater in one community than in the other does not in itself justify a difference in rates. *Id.*

10. See as to expenditures to meet deferred maintenance and setting aside an adequate depreciation reserve as bearing on the estimate for prospective income account. *Id.*
11. While section 181 of the Railroad Law makes the municipality the unit for rate purposes, where it is impossible to apportion expenses among several communities and conditions do not vary materially, the group of communities may be taken to constitute a single fare zone, with a uniform rate of 6 cents with transfer privileges. *Id.*
12. Increase of urban fares in the cities of Olean and Salamanca to 7 cents, and interurban fares based on a rate of 3½ cents a mile, approved. *Petition of Western New York and Pennsylvania Traction Company.* 224
13. In passing on commutation rates, the Commission is required to take into account the cost of giving the service and the return on invested capital. New fares on a mileage basis, with a 6 cent minimum: cash fares 2½ cents per mile; the ticket fare 2 cents; the commutation fare 1½ cents, and the mileage book 1½ cents per mile, approved. *Complaint of Commuters v. Rochester and Syracuse Railroad Company, Inc.* 238
14. A zone system including immediately suburban districts in a flat city rate was preferred to proposed rates using the city line as a zone boundary, where there has been a long established flat city rate applicable in the city and its outlying districts, suburban and interurban. The rates as proposed may be discriminatory. *Complaint of Horseheads Transportation Association et al. v. Elmira Water, Light and Railroad Company.* 247
15. Increased rate schedule to meet increased operating expenses due to war conditions. What is sufficient valuation for such purpose. *Petition of Syracuse and Suburban Railroad Company.* 262
16. There is a limit beyond which street car fares should not be increased. They can not be advanced beyond a certain point without disastrous results to the company. *Petition of Ithaca Traction Corporation.* 283
17. If franchise rate restrictions are waived by the proper local authorities, the Commission has jurisdiction to regulate rates. *Petition of Hudson Valley Railway Company.* 287
18. During the emergency of war it is not necessary to have a careful valuation in order to fix rates to enable the company to pay operating costs and fixed charges. *Id.*
19. Generally, the tariff schedule of an interurban road should be on the mileage basis rather than the zone basis. *Id.*
20. The continuance of a rate for years, resulting in the location of patrons in particular places in reliance thereon, creates an equity which should not be lightly regarded, even though there is apparent discrimination. *Id.*
21. Increase in fare in the cities of Syracuse and Utica from five cents to six cents allowed. *Petition of New York State Railways.* 302.
22. If the operation of a railroad in one municipality affords a fair return upon the value of the property used in the service in that municipality, an increase in fare would not be justified there even though, by reason of the fact that operations of the same company in other communities are conducted at a loss, the company is not receiving a fair return upon its entire invested capital. *Id.*
23. Invested capital, for the purpose of computing rate of return to a public service corporation, means the actual value of the property used in giving the service. *Id.*
24. The equity created by the continuance of a voluntary and lawful establishment of a certain method of charging fares does not furnish ground for the contention that a public utility must be required to do business at a loss. *Matter of a Schedule of Passenger Fares Filed by Albany Southern Railroad Company.* 321

25. Increase in fare from five cents to six cents allowed, subject to certain franchise conditions. *Petition of Fonda, Johnstown and Gloversville Railroad Company.* 330

26. Permission to increase fares, except in the city of Oneonta. *Petition of Southern New York Power and Railway Corporation.* 364

27. Increase in fares allowed in the city of Auburn and the Auburn zone. *Petition of Auburn and Syracuse Electric Railroad Company.* 371

Federal Control.

1. The State has power to regulate even an interstate railroad in the management of its stations, provided such regulation does not interfere with powers which the United States Government has lawfully assumed. *Complaint of Shippers of Himrod Station v. The Pennsylvania Railroad Company.* 339

2. Intrastate rates put into effect while under federal control, by filing with the Interstate Commerce Commission only, are not legal in the State of New York after the road is returned to private control without complying with New York statutes. *Complaint of F. R. Maloney v. Norwood and St. Lawrence Railroad Company.* 359

Franchise.

In the circumstances of the case, it was held that the application for approval of franchises should be granted, but that construction should not be undertaken until proper capital authorization from the Commission should be secured. *Petition of Groton Electric Power Corporation.* 11

Freight Shipments.

Previous orders relating to the marking of less than carload freight modified by eliminating the exceptions to the rule requiring each package, bundle, or piece to be separately marked. *Marking Less Than Carload Shipments of Freight.* 16

Grade Crossing Elimination.

1. Longitudinal wooden joists supported by transverse steel beams riveted to the steel side girders, which in turn support plank flooring, are not a part of the framework of the bridge but are a part of the roadway to be maintained by the municipality, as provided in section 93 of the Railroad Law. *Complaint of Town of Harmony v. Erie Railroad Company.* 188

2. Town authorities petitioning for an alteration of an existing structure must comply with section 91 of the Railroad Law which prescribes that public safety must be shown to require the alteration. *Id.*

Interstate Railroad.

The State has power to regulate even an interstate railroad in the management of its stations, provided such regulation does not interfere with powers which the United States Government has lawfully assumed. *Complaint of Shippers of Himrod Station v. The Pennsylvania Railroad Company.* 339

Jurisdiction.

Upon complaint by owners of lands adjacent to an embankment of a railroad, alleging that a culvert in such embankment constructed to care for the flow of a natural water-course had by reason of changed conditions in the watershed become inadequate to carry off the flow, held that the Commission does not have jurisdiction, the public interest not being involved so far as concerns the facilities of the railroad for rendering service. *Complaint of Village of Middleport et al. v. The New York Central Railroad Company.* 354

Operation, Railroad.

1. An application to cease winter operation of a railroad is not an application to abandon but rather to continue operation in a modified manner. *Petition of Raquette Lake Railway Company.* 345

2. Such an application should be made early enough to give reasonable notice to those interested in its operation, particularly where the railroad has been theretofore operated during the whole year. *Id.*

Public Service Commissions Law.

Section 28: Tariff schedules, publication. *Complaint of F. R. Maloney v. Norwood and St. Lawrence Railroad Company.* 359

Section 29: Changes in schedules. *Id.*

Section 33: Transportation prohibited until publication of schedules. *Id.*

Section 45: General powers and duties of Commissions in respect to railroads. *Complaint of Village of Middleport et al. v. The New York Central Railroad Company.* 354

Section 49: Rates and service to be fixed by the Commission. *Id.*

Section 50: Powers of Commissions to order repairs or changes. *Id.*

Section 49, subdivision 1: Rates of fare on electric railroads. *Petition of United Traction Company, etc.* 207

Sections 71 and 72: Application to fix the price of natural gas. *Petition of Addison Gas and Power Company.* 98

Section 72: Application to fix the price of gas. *Application of Municipal Gas Company of the City of Albany.* 126

Railroad Law.

Section 21: Railroads along highways: stream or watercourse. *Complaint of Village of Middleport et al. v. The New York Central Railroad Company.* 354

Section 85: Certain railroads may cease operation in Winter. *Petition of Raquette Lake Railway Company.* 345

Sections 91 and 93: Grade crossing elimination. *Complaint of Town of Harmony v. Erie Railroad Company.* 188

Section 181: Fares on street surface railroads. *Petition of United Traction Company, etc.* 207

Section 181: Rate of fare. *Petition of Southern New York Power and Railway Corporation.* 364

Section 184: Abandonment of part of route. *Petition of Dunkirk Street Railway.* 352

Rates, Electricity and Gas.

1. A city having granted franchises to two electrical corporations, afterward merged or consolidated, can not object to allowing the owners a fair return on the value of all the property employed in the public service. If the acquisition is for a specific amount of stock and bonds, there should not be an allowance for a prior deficiency of return. The stockholders are entitled to 8 per cent upon the investment, and there should be an allowance for surplus and contingencies. *Petition of Lockport Light, Heat and Power Company.* 27

2. A service charge is justified, applicable to all classes of consumers, the amount of which in any community is dependent upon the facts which pertain in each particular case. *Id.*

3. The limitation of the maximum price of gas in Albany, contained in chapter 227 of the laws of 1907, is constitutional; and section 72 of the Public Service Commissions Law does not permit the Commission to fix a price in excess of that. The limitation in that section in fixing a price "not exceeding that fixed by statute" is constitutional. *Application of Municipal Gas Company of the City of Albany.* 126

4. Under existing war conditions, it was held that rates might be fixed in excess of those established by a contract with a municipality which consented to the proceeding. *Complaint in re Empire Gas and Electric Company.* 150

5. In fixing rates, attention should be given to the needs of public utilities under the admonition of federal authorities; and while they should not be fixed unnecessarily high, a policy of starvation should not be pursued with the possible effect of depriving the public of its utilities. *Id.*

6. Any rate made by an electrical corporation permitting it at its option to discontinue service to one of a class while continuing it to another of the same class is unlawful. *Matter of Service Furnished by Central Hudson Gas and Electric Company.* 336

Rates, Natural Gas.

1. A rate fixed by franchise did not supersede the rate regulating powers of the Commission: so held on an application for approval of an amendment of the franchise in form authorizing an increase. The application should be treated as one under sections 71 and 72, to fix the price of gas. *Petition of Addison Gas and Power Company.* 98

2. A Pennsylvania corporation from which a supply of natural gas was obtained by purchase, sharing in the receipts, could not compel an increase in rates to consumers in order to obtain a higher price; but on examination of the operations of the local company, an increase to a price calculated to yield a return of 8.6 per cent on the value of the property used in the public service was approved. *Id.*

3. Where a natural gas company has in past years earned a fair return, an increase is not justified by anticipation of suspension of industrial use, and the evidence merely shows a theoretical calculation of loss based on such suspension. *Complaint of Mayor of Corning v. Crystal City Gas Company.* 180

Rates, Railroads.

1. Charge for weighing cars for the accommodation of the shipper or consignee increased. *Complaint of Buffalo Foundry and Machine Company v. The New York Central and Hudson River Railroad Company.* 123

2. Intrastate rates put into effect while under federal control, by filing with the Interstate Commerce Commission only, are not legal in the State of New York after the road is returned to private control without complying with New York statutes. *Complaint of F. R. Maloney v. Norwood and St. Lawrence Railroad Company.* 359

Service, Electricity and Gas.

1. Section 62 of the Transportation Corporations Law, requiring apportionment of the expense of installing gas service, does not prescribe the method. Under ordinary circumstances the corporation should pay the expense of installation from main to curb, including the expense of curb-box, and the consumer the expense from curb to meter. *Curtiss v. Elmira Water, Light and Railroad Company.* 120

2. Authority to order extensions to the plant of a gas corporation or an electrical corporation is limited by statute: only a reasonable extension may be ordered. *Complaints of Mayor of New Rothesay et al. v. Westchester Lighting Company.* 173

3. The certificate of incorporation of a public service corporation, and the permission of the Commission to transact business, not alone extend to it certain privileges, but impose upon it the obligation of readiness to respond, even at expense, to all reasonable demands for the product furnished by it. *Complaint of States Metals Co., Inc., v. Chatham Electric Light, Heat and Power Company.* 238

4. Extension ordered for supply of gas. Effect of possible competition with natural gas, and the request of the Federal Government that extensions be confined to those most necessary. *Samuel R. Wickett et al. v. W. J. Judge.* 275

5. A public utility power company is not compelled to furnish power at a loss to a trolley company. *Joint Complaint of Long Island Lighting Company and Babylon Railroad Company.* 278

Service, Natural Gas.

1. The remedy to cure the shortage of natural gas is to procure a supply of manufactured gas to be mixed with it in times of emergency. This can not be ordered by the Commission. *Complaint of Mayor of Batavia v. Alden-Batavia Natural Gas Company.* 186

2. Gas companies can not collect the full amount of their bills unless they render full return in service. *Id.*

3. Where natural gas is very generally distributed among customers of the company: in case of a shortage, a reduction in the amount used by some consumers, and a discontinuance of the supply to others not in the preferred class, is proper. *Complaints against The Pavilion Natural Gas Company.* 183

4. In view of the failing supply, natural gas should be conserved. That class of customers who use enormous quantities because it is cheap should be deprived of a supply, and the use of more than the necessary amount should be prohibited. *Complaint of the Trustees of the Village of Falconer v. Pennsylvania Gas Company.* 242

Service, Telephone.

Companies should not be prevented from making changes in form of service and equipment if they are thereby enabled to render more efficient service to the general public. *Complaint of The H. H. Franklin Manufacturing Company v. New York Telephone Company.* 199

Stations.

1. Facts considered to justify refusal to allow discontinuance of a station. *Petition of The New York Central Railroad Company.* 104

2. The State has power to regulate even an interstate railroad in the management of its stations, provided such regulation does not interfere with powers which the United States Government has lawfully assumed. *Complaint of Shippers of Himrod Station v. The Pennsylvania Railroad Company.* 339

Statutes.

Laws of 1905, chapter 358: Fixing street car fares in Rensselaer, etc. *Petition of United Traction Company, etc.* 207

Laws of 1907, chapter 227: Price of gas in Albany. *Application of Municipal Gas Company of the City of Albany.* 126

Transportation Corporations Law.

Section 62: Apportionment of expense of installing gas service. *Curtiss v. Elmira Water, Light and Railroad Company.* 120

INDEX

TO

LEGISLATIVE DOCUMENTS FOR 1919

	No.
A	
Adjutant-General, report	114
Agricultural and Industrial School, Industry, report.....	117
Agriculture, Commissioner, report.....	59
Albion, Western House of Refuge for Women, report.....	68
American Scenic and Historic Preservation Society, report.....	102
American Society for Prevention of Cruelty to Children, report.....	120
Appropriations, Governor's statement of desired appropriations.....	28
for investigations, message from Governor requesting.....	79
message from Governor on annual appropriation bill, with veto of items disapproved	82
requests for	11
Assembly, bills, supplemental index.....	131
committees, list	23
members	2
Attorney-General, report	53
B	
Banks, Superintendent of, report on banks of deposit and discount.....	4
report on Savings and loan associations, Land banks, etc.....	5
report relative to Savings banks, Trust companies, etc.....	6
Batavia, New York State School for the Blind, report.....	8
Bath, New York State Soldiers' and Sailors' Home, report.....	20
Bedford Hills, New York State Reformatory for Women, report.....	21
Bills, Assembly, supplemental index.....	131
Senate, supplemental index.....	130
Blind, New York State Commission for, report.....	39
schools for, reports.....	8, 33
Boards, commissions and departments, <i>see specific names of</i> .	
Bridges, final report of joint committee on.....	52
Bronx Parkway Commission, report.....	61
Budget estimate	11
C	
Canals, report of Comptroller relating to expenditures on.....	101
report of Superintendent of Public Works on.....	27
Central New York Institution for Deaf Mutes, Rome, report.....	92
Charities, Fiscal Supervisor, report.....	85

	No.
Charities, State Board of, report.....	62
Children, American Society for Prevention of Cruelty to, report.....	120
minimum wages, message from Governor on.....	81
New York Society for the Prevention of Cruelty to, report.....	122
Civil practice, simplification of, report of joint committee on.....	111
Civil Service Commission, report.....	63
Commissions and departments, <i>see specific names of</i> .	
Committees of the Assembly.....	23
Committees, standing, Senate, list.....	22
revised list	26
Commutations granted by Governor, statement of.....	47
Comptroller, State, compilation of desired appropriations.....	28
report	10
report on expenditures on the canals.....	101
requests for appropriations filed with.....	11
special report on expenditures.....	42
special report on municipal accounts.....	29
Conner, J. T., preliminary report on investigation of Industrial Commission	74
Conservation Commission, report.....	54
reply to Senate resolution on Chief Game Protector.....	66
Consolidated laws, supplement to statutory record.....	132
Cornell University, State Veterinary College, report.....	7
Cotillo, Senator Salvatore A., address.....	97
Court of Claims, report.....	58
Craig Colony for Epileptics, report.....	9
Crime, statistics of, report of Secretary of State.....	57
Crippled and Deformed Children, New York Hospital for, report.....	96

D

Deaf mutes, institutions for the instruction of.....	90, 91, 92, 106, 107
Departments, <i>see specific names of</i> .	
Diseases, malignant, <i>see Malignant diseases</i> .	
Drugs, report and testimony taken before joint committee on.....	126

E

Education Department, report.....	65
Elections, Superintendent, report.....	49
Elmira Reformatory, report of managers.....	121
Employment Bureaus of Industrial Commission, message from Governor requesting appropriation for.....	77
Engineer and Surveyor, State, report.....	31
Epileptics, Craig Colony for, report.....	9
Excise, Commissioner of, report.....	12
Extraordinary session	
Housing, statement and recommendations on, Doc. No. 1.	

	No.
F	
Farms and Markets, Council of, communication on prices for milk.....	37
preliminary report on investigation of prices of milk.....	94
report	79
Farms and Markets, Department of, message from Governor relative to..	80
Feeble-minded, State Commission for, report.....	44
Feeble-minded Children, Institution for, report.....	41
Feeble-minded Women, Custodial Asylum for, report.....	25
Fire Island State Park Commission, report.....	36
Fiscal Supervisor of State Charities, report.....	85
Food Commission, report.....	35

G

Governor, requests for appropriations filed with.....	11
statement of desired appropriations	28
statement of pardons and commutations granted by.....	47
Governor, messages:	
annual	3
on annual appropriation bill, with veto of items disapproved.....	82
on reconstruction	34
relative to Department of Farms and Markets.....	80
relative to minimum wages for women and children.....	81
requesting appropriations for Employment Bureau of Industrial Commission	77
requesting appropriations for investigations.....	79
submitting report of committee on National Guard and State Militia	48
transmitting report of Reconstruction Commission on Military Train- ing for Boys.....	78
Grand Army of the Republic, annual encampment, report of proceedings.	125
Greece, resolution requesting the United States at the Peace conference to support claims of people of.....	95

H

Hamilton, F. W., chief game protector, reply of Conservation Commission to Senate resolution on.....	66
Health, State Department, report.....	112
Health Officer, Port of New York, report.....	24
Highways, State Commission, report.....	113
supplemental report	76
Historian, State, report.....	136
supplement to report, Johnson papers.....	128
History of the State of New York in World war.....	129
Hospital Commission, report	84
Hospital for Study of Malignant Diseases, report.....	72
Housing, statement and recommendations to Governor by joint committee on, extra session	1
Hudson, New York State Training School for Girls, report.....	40

I	No.
Ice Comptroller, report	69
report on ice situation in New York city.....	55
Indians, Cayuga nation, report of committee of Land Office on agreement with	67
Industrial Commission, message from Governor requesting appropriation for employment bureaus.....	77
preliminary report of investigation of affairs.....	74
report	124
Industry, New York State Agricultural and Industrial School, report	117
Insurance, Superintendent of, report	60
Investigations, Industrial Commission	74
message from Governor requesting appropriations for	79
Iroquois, Thomas Indian School, report	56
J	
Jamaica Bay-Peconic Bay Canal Board, report	16
Jewish Protectory and Aid Society, report	93
Johnson, Sir William, public papers	128
Juvenile Delinquents, Society for the Reformation of, report	118
K	
Kelly, Rev. Francis A., address	98
L	
Land banks, report of Superintendent of Banks, relative to	5
Land Office, Commissioners, report on escheated lands	50
report of committee on agreement with Cayuga Indians	67
Laws <i>see</i> Consolidated laws; Unconsolidated laws.	
Le Couteulx St. Mary's Institute for Improved Instruction of Deaf Mutes, report	91
Letchworth Village, report	17
Library, State, report	123
M	
Malignant Diseases, State Hospital for study of, report	72
Members of the Assembly	2
Members of the Senate	1
Messages from the Governor, <i>see</i> Governor.	
Military training for boys, message from Governor transmitting report of Reconstruction Commission on	78
Militia, report of committee on policy of State relative to	48
Milk, prices for, communication from Council of Farms and Markets on	37
preliminary report on investigation of same	94
Minimum wages for women and children, message from Governor on	81
Mohawk and Hudson River Humane Society, report	75
Monuments Commission, report	70
report on monument to the 79th regiment	71
Municipal accounts, special report of Comptroller on	29
Museum, State, report	64

INDEX TO LEGISLATIVE DOCUMENTS, 1919

5

N	No.
Napanoch Reformatory, report of managers.....	121
Narcotic Drug Control Commission, report.....	83
National Guard, report of committee on policy of State relative to.....	48
Nautical School, New York State, report.....	32
New York Catholic Protectory, report.....	110
New York city, ice situation, report on.....	55
New York City, Institution for the Improved Instruction of Deaf Mutes, report	107
New York Hospital, Society of, report.....	119
New York Hospital for the Care of Crippled and Deformed Children, report	96
New York Hospital for Treatment of Pulmonary Tuberculosis, report..	51
New York Institute for the Blind, report.....	33
New York Institution for the Instruction of the Deaf and Dumb, report.	108
New York Juvenile Asylum, report of children's village.....	43
New York Monuments Commission, report.....	70
report on monument to the 79th regiment.....	71
New York, New Jersey Port and Harbor Development Commission, progress report	103
New York Society for the Prevention of Cruelty to Children, report....	122
New York Soldiers and Sailors Home, report.....	20
New York State Agricultural and Industrial School, Industry, report..	117
New York State Commission for the Blind, report.....	39
New York State Custodial Asylum for Feeble-Minded Women, Newark, report	25
New York State Library, report	123
New York State Museum, report	64
New York State Nautical School, report.....	32
New York State Reformatory for Women, Bedford Hills, report.....	21
New York State School for the Blind, Batavia, report.....	8
New York State Training School for Girls, Hudson, report.....	40
New York State Veterinary College, report.....	7
New York State Women's Relief Corps Home, Oxford, report.....	38
Newark, New York State Custodial Asylum for Feeble-Minded Women, report	25
Niagara Falls, bibliography.....	133
Niagara Falls, State Reservation at, report.....	45
Northern New York Institution for Deaf-Mutes, report.....	106
O	
Odell, Hon. B. B., report on ice situation of New York city.....	55
Oxford, Women's Relief Corps Home, report.....	38
P	
Palisades Interstate Park Commissioners, report.....	100
Pardons granted by Governor, statement of.....	47
Police, State Department of, report.....	19
Port of New York, Health Officer, report.....	24

